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Reproductive Hazards After Johnson Controls

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ARTICLE

REPRODUCTIVE HAZARDS AFTER *JOHNSON CONTROLS*

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I. INTRODUCTION

In *International Union, UAW v. Johnson Controls, Inc.*,[1] the Supreme Court held that an employer violated Title VII's[2] ban on sex discrimination by excluding all women who could not prove their sterility from production jobs in a lead-battery factory.[3] In sweeping language, the Court indicated that a policy directed only at fertile women is overt discrimination on the basis of sex regardless of the scientific evidence of heightened safety concerns for mothers or potential mothers.[4] The Court then held that the statutory defense for overt discrimination, the bona fide occupational qualification,[5] was not available to Johnson Controls because there was no evidence that employing women might cause financial ruin.[6] Thus, the Court held for the plaintiffs: Johnson Controls' policy was impermissible discrimination on the basis of sex and a violation of Title VII of the Civil Rights Act of 1964.[7] In reaching this decision, the conservative Supreme Court took a position to the left of that taken by the three lower federal appellate courts to consider policies excluding all fertile women from hazardous jobs.[8]

The case raises a number of questions, beginning with the obvious one of why so conservative a Court would reach so liberal a decision (and one opposed by employers) in so controversial an area. Another question is whether the Court would similarly hold inconsistent with Title VII's ban on sex discrimination an employer policy offering pregnant workers or, perhaps all workers trying to become parents, special risk-minimizing options? Also, how would the Court regard a policy

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1. 499 U.S. 187 (1991).
2. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992).
3. *Johnson Controls*, 499 U.S. at 198.
4. *Id.* at 197-200.
5. Under Title VII, the BFOQ defense is limited to situations in which discrimination is reasonably necessary to the normal operation of the particular business. *Id.* at 201.
6. *Id.* at 206.
7. *Id.* at 200.
8. The lower federal appellate courts found the disparate impact/business necessity theory, which imposes a less stringent burden on an employer, applicable in fetal protection policy cases. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 883 (7th Cir. 1989) (en banc), *rev'd*, 499 U.S. 187 (1991); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1185 (4th Cir. 1982); refer to notes 29-41 *infra* and accompanying text.

of firing or limiting the employment of pregnant women?

Often it is the worker, who is either pregnant or wishes to become a parent in the immediate future, who desires some sort of accommodation of fetal risk by the employer, perhaps in the form of a temporary transfer to a low-lead area or some other accommodation during a period of heightened risk. Is there anything in current anti-discrimination law, including the Americans with Disabilities Act,[9] or the Family and Medical Leave Act of 1993,[10] that would support an employee's claim to reasonable accommodation?

The *Johnson Controls* decision also raises several questions from the perspective of employers. What is the possible scope of employer liability in tort given the obligation not to discriminate on the basis of sex even when female and male employees vary with respect to fetal risk? What measures should be considered to protect employers, and perhaps workers as well, if ruinous tort liability does become a palpable risk, particularly if it is linked to maternal employment more than to paternal employment?

This Article examines the *Johnson Controls* decision to understand why the Court reached its decision and explores these questions. Part II discusses the relevant cases and policy analysis, including the Title VII cases prior to *Johnson Controls*, the policy issues raised by these cases, and briefly examines the *Johnson Controls* decision. Part III discusses what sorts of distinctions employers should be able to make between employees in terms of reproductive hazards without violating Title VII and *Johnson Controls*. Part IV discusses the problems that remain from the perspective of both employers and employees.

II. CASELAW AND POLICY

Prior to the Supreme Court's decision in *Johnson Controls*, five federal courts of appeals considered the legality of fetal vulnerability policies.[11] Two of the policies at issue required

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9. 42 U.S.C. §§ 12101-12213 (Supp. III 1991).

10. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (to be codified at 29 U.S.C. §§ 2601, 2611-19, 2631-36, 2651-54; 5 U.S.C. §§ 2105, 6381-87) [hereinafter FMLA].

11. *See* Grant v. General Motors Corp., 908 F.2d 1303, 1311 (6th Cir. 1990) (finding that the fetal protection policy was discriminatory and could only be justified by a BFOQ defense); *Johnson Controls*, 886 F.2d at 901 (holding that Johnson Controls had both a business necessity defense and a BFOQ defense by demonstrating that its job exclusion policy was reasonably necessary for safety); *Hayes*, 726 F.2d at 1554 (holding that the defendant failed to rebut the presumption of facial

pregnant workers to be fired in order to protect the health of their unborn children.[12] The other three policies were similar to (and included) that at issue in *Johnson Controls*: certain hazardous jobs were closed to all women who could not show sterility.[13]

A. *Decisions in the Federal Courts of Appeals*

In the two cases in which hospitals fired pregnant X-ray technicians, the Courts of Appeals for the Fifth and Eleventh Circuits ruled in the technicians' favor.[14] In the Fifth Circuit case, the court emphasized that less restrictive alternatives were available, for example, the temporary transfer of the pregnant X-ray technicians to less hazardous positions, and concluded that the discharge policy impermissibly violated Title VII.[15] In the Eleventh Circuit case, the court would have allowed the discharge policy if the employer had shown that pregnant workers' employment opportunities were limited only when risks to the fetus were unreasonable.[16] Because the hospital's policy tolerated *no* risk at all for pregnant workers, the court regarded it as unreasonable and not permissible under Title VII.[17] In addition, the court regarded the employer's failure to explore less drastic alternatives, such as rearranging the plaintiff's duties so as to minimize her exposure to radiation, as precluding a successful defense to the plaintiff's discrimination claim.[18]

In the three cases in which employers closed certain jobs

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discrimination that arose when it fired the plaintiff upon learning of her pregnancy); *Wright*, 697 F.2d at 1189-90 (holding that an employer may use a business necessity defense when restricting job access to protect the health of female employees' unborn children); Zuniqa v. Kleberg County Hosp., 692 F.2d 986, 992-94 (5th Cir. 1982) (holding that the defendant hospital's business necessity defense was actually a pretext for discrimination because it failed to utilize less discriminatory alternative methods for achieving its business purpose).

12. *See Hayes*, 726 F.2d at 1546 (concerning hospital's policy of firing pregnant X-ray technicians); *Zuniqa*, 692 F.2d at 989 (same).

13. *See Grant*, 908 F.2d at 1304 (analyzing General Motors' "fetal protection" policy which excluded all fertile women from foundry jobs involving exposure to airborne lead); *Johnson Controls*, 886 F.2d at 876 (ruling on a fetal protection policy excluding all fertile women from high lead exposure positions in the employer's battery manufacturing division); *Wright*, 697 F.2d at 1182 (discussing Olin's "female employment and fetal vulnerability" program that excluded women from jobs having exposure to known or suspected abortifacient or teratogenic chemicals).

14. *Hayes*, 726 F.2d at 1541; *Zuniga*, 692 F.2d at 994.

15. *Zuniga*, 692 F.2d at 992-94 (noting that applicable law did not include the Pregnancy Discrimination Act of 1978).

16. *Hayes*, 726 F.2d at 1550-51.

17. *Id.*

18. *Id.* at 1553-54.

to all women who could not show sterility, the Fourth and Sixth Circuits indicated that although the records before them could not support the policies, reasonable policies applying to all fertile women would be allowed.[19] In the Seventh Circuit's *Johnson Controls* decision, the majority of the en banc court upheld the District Court's grant of summary judgment to the employer, holding that the policy excluding all fertile women from production jobs did not violate Title VII.[20]

Under Title VII of the Civil Rights Act of 1964, as interpreted by the Court and amended by Congress, there are two major ways to analyze employment discrimination cases: disparate treatment and disparate impact.[21] The crux of a disparate treatment sex discrimination case is the allegation that the employer treated the plaintiff differently because she was a woman.[22] Such discrimination is proscribed by the plain language of Title VII, which forbids differential treatment of employees as to terms and conditions of employment "because . . . of sex."[23] There is one defense to such an allegation (if found to be true by the fact finder): the statutory BFOQ[24] defense, which courts construe fairly narrowly.[25]

The crux of a disparate impact case is the allegation that an employer rule or practice, though neutral on its face, has a disparate impact on women, i.e., depresses or limits in some

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19. *See* Grant v. General Motors Corp., 908 F.2d 1303, 1311 (6th Cir. 1990) (finding job exclusion policies permissible upon a showing of a factual basis for believing women workers cannot perform safely and efficiently); Wright v. Olin Corp., 697 F.2d 1172, 1189-90 (4th Cir. 1982) (stating that reasonable workplace restrictions may be placed upon women workers to protect their unborn children).

20. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 901 (7th Cir. 1989) (en banc), *rev'd*, 499 U.S. 187 (1991).

21. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (stating that a prima facie case of disparate treatment is shown when a member of a category protected by Title VII is qualified and applies for a job but is rejected for reasons giving rise to an inference of discrimination); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (finding that disparate treatment is shown where (a) the applicant belongs to a racial minority group; (b) the applicant was qualified for the job; (c) the applicant was rejected; and (d) the employer continued to look for applicants with the rejected applicant's qualifications); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating that the disparate impact theory of Title VII prohibitions includes employment practices that are facially neutral but discriminate in their disproportionately negative effect on protected minorities).

22. *See Hayes*, 726 F.2d at 1547 (describing the disparate treatment method of proving discrimination under Title VII when an employer facially discriminates between employees by categories of race, religion, national origin, and gender).

23. 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. III 1991).

24. *Id.* § 2000e-2(e); refer to note 5 *supra*.

25. *See* Dothard v. Rawlinson, 433 U.S. 321, 333-34 (1977) (noting that the BFOQ defense "provides only the narrowest of exceptions" to Title VII's rule that employers provide equal employment opportunities).

way women's employment opportunities relative to men's.[26] Although Title VII's original statutory language did not plainly include such claims, Congress has since codified a 1971 Supreme Court case recognizing the disparate impact method of proving discrimination.[27] The defense to such an action is the somewhat looser business necessity defense.[28]

These two modes of analysis were available when the Courts of Appeals considered the legality of fetal protection policies under Title VII.[29] The disparate treatment inquiry seeks to determine whether an employer actually treated women and men differently.[30] If so, then the employer will have violated Title VII absent a finding that the sex is a BFOQ for the job in question, a rather narrow exception.[31] The disparate impact inquiry seeks to determine whether a job requirement is linked closely enough to legitimate business

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26. *See Griggs*, 401 U.S. at 431-32 (finding disparate impact in violation of Title VII when an employer's standardized tests resulted in a disproportionate ratio of blacks being excluded from desirable jobs); *Dothard*, 433 U.S. at 329-31 (applying the disparate impact analysis developed in *Griggs* to find that Alabama's statutory height and weight requirements for prison guards disparately affected women in violation of Title VII).

27. *See Griggs*, 401 U.S. at 431-32 (finding that Title VII prohibits both overt discrimination and employment practices having a discriminatory impact) (codified at 42 U.S.C. § 2000e-2(k) (Supp. III 1991)).

28. *See id.* at 431; 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. III 1991). In *Griggs*, the Court stated that an employment practice that discriminates against a Title VII protected class is prohibited if it cannot be shown to be related to job performance. *Griggs*, 401 U.S. at 431.

The *Johnson* Court required a showing of the employer's potential financial ruin for Johnson Controls to successfully invoke the BFOQ defense. *See* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991). In comparison, the business necessity defense requires only a showing that the discriminating employment practice is related to employee job performance. *See Griggs*, 401 U.S. at 431.

29. *See* Grant v. General Motors Corp., 908 F.2d 1303, 1310 (6th Cir. 1990) (analyzing the fetal protection policy exclusively under the disparate treatment model for overt discrimination); International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 886 (7th Cir. 1989) (following the Fourth and Eleventh Circuits in adopting a disparate impact analysis), *rev'd*, 499 U.S. 187 (1991); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548, 1552 (11th Cir. 1984) (utilizing both the disparate treatment and disparate impact theories); Wright v. Olin Corp., 697 F.2d 1172, 1185 (4th Cir. 1982) (finding the disparate treatment model wholly inappropriate for analyzing a fetal vulnerability policy and adopting the disparate impact analysis); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 989-90 (5th Cir. 1982) (finding that the plaintiff established a prima facie disparate impact case, thus shifting the burden to the employer to show that business necessity justified its action).

30. *See, e.g., Johnson Controls*, 499 U.S. at 198 (noting that Johnson Controls' policy was not neutral because it did not apply to male reproductive capacity in the same manner as to that of females).

31. *See id.* at 200 (quoting 42 U.S.C. § 2000e-2(e) (1988)) (stating that an employer may rebut a claim of facial sex discrimination if sex falls within the restrictive scope of a BFOQ reasonably necessary to normal operation of its business); refer to notes 24-25 *infra*.

needs, broadly understood, to justify its use despite its disparate impact on a group protected under Title VII.[32]

Although the disparate treatment model would seem the appropriate framework for analyzing an employment policy applying on its face only to women, the courts that have considered fetal protection policies used both disparate treatment and disparate impact models.[33] Four of the five courts used disparate impact, often with tortured explanations of why this was the appropriate mode of analysis.[34] It is possible to analyze a policy applying only to fertile or pregnant women as discriminating on the basis of something other than sex, so that the disparate impact model is appropriate. Such a policy discriminates on the basis of pregnancy or the ability to become pregnant, rather than sex. Thus the policy discriminates not between women and men but between people able to become pregnant or actually pregnant (some women) and other people (other women and men). Indeed, this approach was taken by the Supreme Court in the 1976 case of *General Electric Co. v. Gilbert*.[35] In that case, the Court held that an employer's decision not to afford disability protection for pregnancy-related disabilities was not sex discrimination because it was based on an underlying factor independent of sex: the cost of covering pregnancy-related disabilities.[36] But

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32. *See Wright*, 697 F.2d at 1188 (posing the question whether an employment policy of job exclusion, justified as necessary to protect unborn fetuses, is a business necessity despite the policy's disproportionate adverse impact on women employees); *Zuniga*, 692 F.2d at 991-92 (determining that the business necessity requires an inquiry into whether an overriding, legitimate business purpose for a sex or pregnancy-related categorization is necessary for safe and effective business operations).

33. Refer to note 21 *supra*.

34. *Johnson Controls*, 886 F.2d at 883-84 (citing *Wright*, 697 F.2d at 1185 & n.2) (rationalizing that even though the employer's fetal protection policy was not facially neutral, the underlying similarities between disparate impact cases and the plaintiff's challenge to Johnson Controls' policy required analysis under the disparate impact/business necessity model); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984) (holding that an employer can show that its scientifically-based job termination for pregnancy policy is "neutral" in that the policy "equally protects the offspring of all employees"); *Wright*, 697 F.2d at 1185 & n.21 (referring to the BFOQ defense as merely a paradigmatic defense in disparate treatment cases involving overt discrimination, but opining that an employer is not limited to this sole business necessity defense because, in the court's view, nothing in Title VII makes the BFOQ defense exclusive); *Zuniga*, 692 F.2d at 990-92 (proceeding directly to the employer's business necessity defense for discharging pregnant X-ray technicians without discussion of the higher BFOQ defense standard and without clarifying whether the plaintiff had established a prima facie disparate treatment or disparate impact case). Only the Sixth Circuit relies exclusively on the disparate treatment model. *See* Grant v. General Motors Corp., 908 F.2d 1303, 1310 (6th Cir. 1990).

35. 429 U.S. 125 (1976).

36. *Id.* at 133-35 (quoting Geduldig v. Aiello, 417 U.S. 484, 494, 496 n.20 (1974)).

Congress overruled *Gilbert* with the Pregnancy Discrimination Act of 1978 (PDA), which provides that sex discrimination prohibited by Title VII includes distinctions based on pregnancy, childbirth, or related medical conditions.[37]

Given that the PDA extends Title VII's ban on sex discrimination to include discrimination on the basis of pregnancy and related medical conditions such as fertility, the appellate decisions using disparate impact as the only or primary mode of analysis read like something out of *Alice in Wonderland.*[38] Consider, for example, the "reasoning" of the Fourth Circuit Court of Appeals in explaining why it would use the disparate impact model to analyze a policy which by its terms, and as quoted by the court, dealt with "'female employment and fetal vulnerability.'"[39] The court described the policy as "literally expressed in gender neutral terms," and thus one for which the disparate impact analysis was appropriate.[40] The court did admit that the policy's neutrality "might be subject to logical dispute," but regarded the dispute as "mere semantic quibbling."[41]

These decisions can only be understood as reflecting a deep-seated need to "protect" women and children when "reasonable" regardless of the relevant law. The law aside, this goal might seem understandable. Surely "reasonable"

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37. 42 U.S.C. § 2000e(k) (1988) [hereinafter PDA]. According to both Senate and House reports, Congress considered the approach in *Gilbert* inconsistent with a proper understanding of Title VII's anti-discrimination mandate. *See* S. REP. NO. 331, 95th Cong., 1st Sess. 2-3 (1977) (commenting that the PDA made express the "commonsense" view that sex discrimination prohibited by Title VII includes discrimination on the basis of pregnancy, rejecting *Gilbert*), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4749-51; H.R. REP. NO. 948, 95th Cong., 2d Sess. 5 (1978) (noting that the PDA's purpose was to reverse the outcome in *Gilbert*, so that employers could not discriminate between pregnancy and related medical conditions and other disabilities with respect to benefits), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4753.

38. LEWIS CARROLL, ALICE IN WONDERLAND (Donald J. Gray, ed. 1971). The disparate impact approach is an odd post-PDA strategy for courts to follow when analyzing employment practices that overtly categorize employees on the basis of their fertility, ability to bear a child, or the lack thereof, because the PDA clarified that fertility-based distinctions are intentional policies of sex discrimination. Refer to note 37 *supra* and accompanying text. Intentional discrimination, of course, should be analyzed under the *McDonnell Douglas/Burdine* disparate treatment model. Refer to note 21 *supra*. The use of the disparate impact model is somewhat more understandable in cases that arose prior to the effective date of the PDA. *See, e.g.*, Wright v. Olin Corp., 697 F.2d 1172, 1178 (4th Cir. 1982) (concerning a sex discrimination complaint filed with the EEOC in July 1976, before the PDA's effective date); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 989 n.6 (5th Cir. 1982) (noting that the facts occurred prior to the PDA taking effect).

39. *Wright*, 697 F.2d at 1182.

40. *Id.* at 1186.

41. *Id.*

restrictions on maternal employment are appropriate in *some* circumstances. There are, after all, many jobs in the American economy. Why should fertile or pregnant women work at those that are particularly hazardous to the well-being of their unborn or unconceived children?

B. Policy Analysis

Close analysis of the policy issue reveals a much more complicated reality. We cannot effectively "protect" children by limiting the employment opportunities of women. Indeed, such policies are likely often to hurt children. I make two major points in this discussion. First, the scientific evidence of risks associated with maternal and paternal occupational exposure does not support fetal protection policies which exclude only women from jobs posing reproductive hazards. Second, given working women's roles as economic actors, the pattern of "protection" adopted by companies causes greater harm to the children of working women than such policies avoid.

1. The Scientific Evidence. The available scientific evidence provides no basis for protecting the well-being of the next generation by limiting the employment opportunities of women only.[42] We actually know relatively little about risks associated with occupational exposure at current levels to various reproductive hazards.[43] Much of the evidence used in formulating fetal protection policies was compiled when women workers were exposed to far higher levels of workplace toxins than now[44] or when tragedies, such as the atomic bomb, produced high exposure levels.[45] Much information on suspected reproductive health hazards is based on animal

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42. *See, e.g.*, Judith A. Scott, *Keeping Women in Their Place: Exclusionary Policies and Reproduction, in* DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME 180, 183-84 (Wendy Chavkin ed., 1984) [hereinafter DOUBLE EXPOSURE] (noting that lead exposure, for example, has adverse effects on the reproductive health of men as well as women).

43. *See generally* Maureen Hatch, *Mother, Father, Worker: Men and Women and the Reproductive Risks of Work, in* DOUBLE EXPOSURE, *supra* note 42, at 161, 161 (noting that the literature regarding occupational exposure to reproductive hazards is full of conflicting findings and large gaps exist in available literature).

44. For example, although lead is a well-documented fetal hazard at high exposure levels, there is little data available about its reproductive effects at current exposure levels. *Id.* at 171.

45. *See, e.g.*, NATIONAL COUNCIL ON RADIATION PROTECTION AND MEASUREMENTS, REP. NO. 53, REVIEW OF NCRP RADIATION DOSE LIMIT FOR EMBRYO AND FETUS IN OCCUPATIONALLY-EXPOSED WOMEN 13-16 (1977) (surveying physical and cognitive development of children exposed in utero to radiation due to the nuclear bomb detonations in Hiroshima and Nagasaki, Japan).

studies of uncertain relevance.[46] Epidemiological evidence, evidence from the study of outcomes based on the incidence of diseases in human populations, is scant and, because of methodological problems, rarely conclusive.[47]

Indeed, there is little firm evidence that today jobs present greater risks for women than for men.[48] There is no sound scientific evidence that risks associated with paternal exposure are lower than those associated with maternal exposure.[49] Few studies have been done on the reproductive risks associated with male exposure[50] because of cultural assumptions that mothers are more closely linked to children and are more responsible for children's problems and disabilities than are fathers.[51] The studies that have been done on paternal exposure indicate it is likely that agents posing reproductive risks through maternal exposure are also dangerous through paternal exposure.[52] For example, some toxic agents such as

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46. OFFICE OF TECHNOLOGY ASSESSMENT, REPRODUCTIVE HEALTH HAZARDS IN THE WORKPLACE 3 (1985) [hereinafter REPRODUCTIVE HEALTH HAZARDS] (noting that reproductive information derived through animal studies presents unique problems of interpretation when applied to humans).

47. *See id.* at 8-9, 67-68. The report cited difficulties with epidemiological studies on reproductive health hazards, including that the association with workplace exposure and health damage is based on retrospective information collected after the worker suffers the damage to her health, exposure types and levels are difficult to determine, devices for the detection of diminished reproductive function vary in accuracy, control groups may be too small or poorly defined, and studies often fail to control for other variables affecting reproductive capacity, such as lifestyle (including alcohol, drug, and tobacco use), ethnicity, and disease-related factors. *Id.*

48. *See id.* at 68 (stating that no biological evidence supports the assumption that either women or embryos and fetuses are more susceptible to reproductive hazards than men).

49. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, GUIDELINES ON PREGNANCY AND WORK 3 (U.S. Dept. of Health, Educ., & Welfare, DHEN, NIOSH Pub. No. 78-118, 1977) [hereinafter GUIDELINES ON PREGNANCY].

50. *See* IAN C.T. NISBET & NATHAN J. KARCH, CHEMICAL HAZARDS TO HUMAN REPRODUCTION 14 (1983) (stating that the few studies on the effect of male exposure to toxic chemicals focused on sperm production in men and pregnancy outcomes in their wives); Joanna F. Haas & David Schottenfeld, *Risks to the Offspring from Parental Occupational Exposures*, 21 J. OCCUPATIONAL MED. 607, 609-12 (1979) (describing results of the few studies conducted on potential male reproductive hazards, including chromosal abnormalities in males with occupational vinyl chloride exposure, chromosome aberrations in men with benzene exposure in the workplace, and increased juvenile cancer rates in children of fathers with occupational exposure to hydrocarbons); Sandra Blakeslee, *Research on Birth Defects Shifts to Flaws in Sperm*, N.Y. TIMES, Jan. 1, 1991, at A1 (noting that research has tended to focus on mothers and fetuses because of their ease of study, compared to fathers).

51. *See, e.g.*, Blakeslee, *supra* note 50, at A16 (noting scientists' adherence to a "macho sperm theory of conception," referring to an assumption that a sperm capable of fertilizing an egg lacks any defects).

52. NISBET & KARCH, *supra* note 50, at 17; REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 69-111 (extensively surveying adverse effects on the reproductive function of men and women from exposure to common workplace chemicals such as

lead and other heavy metals, pesticides, and solvents "have been shown to cause infertility in males as well as adverse pregnancy outcomes resulting from mutations in male germ cells."[53] Paternal exposure to toxic agents can cause harm because of abnormalities in the fertilizing sperm, the transmission of dangerous agents through intercourse during pregnancy such as lead in semen, or because male workers bring contaminants home on their clothes, hair, skin, and so on.[54] The precise relative risks associated with maternal and paternal exposure at current exposure levels are simply unknown.[55] Often, a fertile male will pose a greater risk to

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arsenic, boron, and mercury, to physical agents in the workplace including ionizing radiation, magnetic fields, and noise, to physical and psychological stress, and to biological agents in the workplace including rubella, hepatitis B, and recombinant DNA). One article which surveys known adverse outcomes on reproduction as a result of male and female toxic exposures concludes that

> [t]he scientific basis for differential regulation is limited. Reproduction involves a wider range of processes in females than in males, and some processes in females involve critical periods of [fetal] differential [sic] and development . . . . However, it does not necessarily follow that women are more sensitive to the action of any given agent. Where extensive data have been compiled on both sexes (e.g., for anesthetic gases and smelter emissions), evidence has been found for adverse effects resulting from exposure of both men and women, including some evidence for adverse fetal effects following exposure of males . . . . More evidence is required to establish whether males and females differ in sensitivity.

NISBET & KARCH, *supra* note 50, at 114.

53. NISBET & KARCH, *supra* note 50, at 14 (citing Jeanne M. Manson, *Human and Laboratory Animal Test Systems Available for Detection of Reproductive Failure*, 7 PREVENTIVE MED. 322, 322, 327 (1978)) (noting the flawed presumption that employment policies excluding women from jobs produces a male worker population that is safe from adverse effects resulting from toxic substance exposure); *see also* Jane E. Brody, *Sperm Found Especially Vulnerable to Environment: Miscarriages, Defects, Infertility Linked to Damage by Toxins*, N.Y. TIMES, Mar. 10, 1981, at C1 (noting increasing scientific recognition of the fact that fathers' exposures to environmental and industrial chemicals play a role in pregnancy problems).

54. *See* RICHARD L. NAEYE & NEBIAT TAFARI, RISK FACTORS IN PREGNANCY AND DISEASES OF THE FETUS AND NEWBORN 7 (1983) (noting that teratogenic substances in sperm may damage fertilized ova); NISBET & KARCH, *supra* note 50, at 14-15 (noting adverse effects on sperm influenced by chemical agents and the possible transfer of these agents to the female or fetus during intercourse); Peter Aldhous, *Leukaemia Cases Linked to Fathers' Radiation Dose*, 343 NATURE 679, 679 (1990) (noting a link between fathers' radiation exposure and their children's juvenile leukaemia); Devra L. Davis, *Fathers and Fetuses*, N.Y. TIMES, Mar. 1, 1991, at A27 (summarizing study results indicating that fathers' jobs and lifestyle habits affect fertility, their spouses' ability to become pregnant, and their children's birth weight and fetal development); Margaret Seminario, *Women Workers: Hazards on the Job*, AFL-CIO AM. FEDERATIONIST, Aug. 1978, at 22 (detailing increased sterility, stillbirths, miscarriages, and sperm abnormalities due to male exposure to workplace toxins).

55. *See* REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 3 (stating that what is unknown about reproductive health hazards far outweighs what is known); Blakeslee, *supra* note 50, at A1 (stating that "the cause of 60 to 80 percent of birth

fetal safety than a fertile non-pregnant female.[56] Spermatogenesis, the rapid division of sperm cells in the testes,[57] is an ongoing process, whereas the female's ova all are produced by early infancy, and rapidly dividing cells are more susceptible to a number of injuries.[58] Also, some substances such as lead and cadmium "concentrate in the male reproductive tract [and] are quite toxic to sperm."[59]

Even if maternal exposure were a hundred times more hazardous to the health of children born or conceived thereafter than paternal exposure, policies excluding only fertile women from high-risk jobs, like that adopted by Johnson Controls, would not be a rational response.[60] Under Johnson Controls' policy, Elsie Nason, a fifty-year-old divorcee who could not prove sterility, was transferred out of a high-paying job involving lead exposure, while Donald Penney, a young married man without children, was denied a request for a leave of absence to lower his lead level before he and his wife tried to conceive a child.[61]

The probability of Elsie Nason becoming pregnant was close to zero; therefore, the risk to the next generation as a result of her exposure was also nearly zero.[62] Pregnancy rates are not even published for her age group, and only one woman out of 5000 between forty-five and forty-nine years old has a

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defects is not known"); Brody, *supra* note 53, at C3 (noting that the study of paternal exposure to hazardous substances is in its infancy).

56. Refer to notes 57-58, 65-66 *infra* and accompanying text.

57. Blakeslee, *supra* note 50, at A16.

58. *See* Donald Whorton et al., *Reproductive Disorders, in* OCCUPATIONAL HEALTH: RECOGNIZING AND PREVENTING WORK-RELATED DISEASE 307, 308 (Barry S. Levy & David H. Wegman eds., 1983) (finding that males may be more susceptible to adverse reproductive effects due to the rapid cell multiplication during spermatogenesis than females during the relatively slower cell division process of oogenesis, the egg's maturation prior to ovulation); Blakeslee, *supra* 50, at A16 (noting that in contrast to egg cells which females are born with, male sperm cells are particularly susceptible to genetic damage due to toxic exposures to at least 100 chemicals during spermatogenesis).

59. Brody, *supra* note 53, at C1 (quoting Dr. Leonard Nelson, a reproductive physiologist at the Medical College of Ohio). Sperm may be damaged or killed by toxic chemicals in seminal plasma. NISBET & KARCH, *supra* note 50, at 15.

60. Refer to notes 48-59 *supra* and accompanying text for a survey of scientific evidence indicating that reproductive risks associated with pre-conception paternal exposure to toxic substances are at least as great or greater than those associated with women's exposure prior to conception.

61. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 192-93 (1991) (noting that both were members of a class consisting of employees affected by Johnson Controls' Fetal Protection Policy).

62. *See* Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1233 n.68 (1986) (citing the 1983 census report for the proposition that for women over 40 the birth rate drops to near zero).

child in any given year.[63] On the other hand, Donald Penny was accumulating significant body lead burdens at the same time he was trying to have a family.[64] Exposure to lead can have a variety of negative reproductive effects in men, including impotence, sterility, decreased libido, mutative spermatogenesis, and effects on sperm production, motility, and morphological features (sperm shape).[65] There is evidence that wives of men exposed to lead are more likely to be childless or to have spontaneous abortions or stillbirths than women in the general population.[66] Also, some evidence indicates that the incidence of fetal abnormalities is higher than normal for the children of male workers exposed to lead.[67] Intercourse during pregnancy might be one causal factor in these paternal effects on fetal outcome, since lead is excreted in seminal fluid.[68] Even if the reproductive risks of paternal exposure to lead were a fraction of those associated with maternal exposure, it would make no sense to employ Donald Penney in a hazardous, high exposure job and to exclude Elsie Nason.

This conclusion is consistent with that reached by the Occupational Health and Safety Administration (OSHA) when it investigated this issue. During the 1970s, OSHA found evidence of reproductive risk for men as well as for women exposed to lead and concluded, after extensive hearings, that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy."[69]

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63. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989, at 65 (112th ed. 1992).

64. *Johnson Controls*, 499 U.S. at 192.

65. Medical Surveillance Guidelines, Appendix to OSHA Lead Control Regulations, 29 C.F.R. § 1910.1025 app. C (II)(5), at 833 (1987) [hereinafter Medical Surveillance Guidelines]; Christopher Winder, *Reproductive Effects of Occupational Exposures to Lead: Policy Considerations*, 8 NEUROTOXICOLOGY 411, 412-13 (1987); *see also* Leo Uzych, *Teratogenesis and Mutagenesis Associated with the Exposure of Human Males to Lead: A Review*, 58 YALE J. BIOLOGY & MED. 9, 9-10 (1985) (noting studies conducted in 1860 and 1910 on lead workers whose wives suffered increased numbers of stillbirths, spontaneous abortions, and miscarriages).

66. Medical Surveillance Guidelines, *supra* note 65, at 833; Uzych, *supra* note 65, at 10; Winder, *supra* note 65, at 412.

67. *See* REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 70 (noting an 1860 study of male lead-exposed workers in which of 32 total pregnancies and 20 live births, 8 children died within the first year); Uzych, *supra* note 65, at 14-15 (summarizing research on chromosomal aberrations in lead-exposed male workers); Winder, *supra* note 65, at 413 (commenting that paternal lead toxicity may affect fetal development, but adding that evidence supporting this result is not substantial).

68. *See* Winder, *supra* note 65, at 412 (suggesting that lead toxicity in seminal fluid can influence the development of a fetus); Brody, *supra* note 53, at C3 (noting that substances carried in seminal fluid can affect the developing embryo, and thus the father's influence on a pregnancy outcome extends beyond conception).

69. *See Occupational Safety and Health Standards: Occupational Exposure to*

In litigation, Johnson Controls relied on recent studies by David Bellinger and four colleagues associating umbilical cord blood lead levels with physical and neuropsychological development of the fetus.[70] These studies found a correlation between intrauterine exposure, as measured by umbilical cord blood lead concentration, and the risk of minor malformations and delayed cognitive development.[71] However, Bellinger and one co-author, Herbert L. Needleman, protested this use of their research, saying they "did not measure paternal exposure and therefore [could] not rule this out as a contributing factor in [their] findings."[72] They noted that, although there have been fewer studies linking paternal exposure to lead with reproductive outcome, some, but not all, of these studies have shown toxic effects.[73] They concluded that the fact that less evidence exists does not signify "differential sensitivity of male and female workers."[74] In sum, "[t]he position that a given level of paternal but not maternal exposure [to lead] is acceptable is without logical foundation and insupportable on empirical grounds."[75]

This point generally holds true with regard to male and female exposure to substances in addition to lead.[76]

Lead, 43 Fed. Reg. 52,953, 52,966 (1978) (including statements in preamble concerning the history of the regulation that preceded enactment of the original OSHA lead standard); 29 C.F.R. § 1910.1025 app. C (II)(5) (1993) (stating that exposure to lead can negatively affect reproductive function in both males and females).

70. *See* Herbert L. Needleman & David Bellinger, *Recent Developments*, 46 ENVTL. RES. 190, 190 (1988) (citing David Bellinger et al., *Longitudinal Analyses of Prenatal and Postnatal Lead Exposure and Early Cognitive Development*, 316 NEW ENG. J. MED. 1037, 1037-43 (1987); Herbert L. Needleman et al., *The Relationship Between Prenatal Lead Exposure and Congenital Anomalies*, 251 J. AM. MED. ASS'N 2956, 2956 (1984) [hereinafter *Congenital Anomalies*]) (noting that their work was cited in support of Johnson Controls' policy barring women of childbearing age from jobs in which blood levels might rise above 30 micrograms per deciliter, but permitting such exposures for all other employees, on the theory that the fetus is "uniquely sensitive to low-level exposures").

71. Needleman & Bellinger, *supra* note 70, at 190; *see* Bellinger et al., *supra* note 70, at 1037 (presenting study results correlating high prenatal lead exposure with lower cognitive development test scores for infants); *Congenital Anomalies*, *supra* note 70, at 2956 (finding lead to be associated with an increased risk for minor anomalies in fetuses).

72. Bellinger & Needleman, *supra* note 70, at 190.

73. *Id.*

74. *Id.*

75. *Id.* at 190-91.

76. *See* REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 68 (cautioning that no evidentiary basis exists for assuming that exposure to the vast range of reproductive toxins poses a greater risk to women, embryos, and fetuses than to men). *See generally id.* at 69-110 (summarizing adverse reproductive outcomes due to male, female, and fetal exposure to industrial substances as diverse as formaldehyde, vinyl halides, radiation, magnetic fields, infectious agents, and recombinant DNA).

Nonetheless, in addition to policies regarding lead, more than a dozen major corporations have policies excluding fertile women from jobs involving "excessive" exposure to benzene, vinyl chloride, carbon tetrachloride, carbon monoxide, mercury and carbon disulfide, toluene, cadmium, coal tar, acrylamide, and trichloroethylene.[77] For these substances, too little is known about the precise levels of fetal risk at current occupational exposure levels of either mothers or fathers to warrant differential standards based on sex.[78] Thus, regardless of the technicalities of sex discrimination law, the scientific evidence on workplace hazards cannot support differential treatment of men and women workers from a policy perspective.

2. "Protection" Only When Women Are Marginal Workers. An additional problem from a policy perspective is the pattern of protection. Women and unborn or unconceived children have not been "protected" from fetal hazards whenever there is a workplace with a certain level of fetal hazards. Rather, women and children have been "protected" only when women are marginal workers, i.e., only from jobs held predominantly by men, typically unionized blue collar jobs with relatively high pay and good medical benefits

As far as I know, only one empirical study has looked at the circumstances under which policies excluding fertile women arise.[79] In a 1987 study of Massachusetts chemical and electronics firms, researchers examined the industrial use of four substances—lead, radiation, glycol ethers, and mercury—all of which are known to cause or are strongly suspected of causing harm to both male and female reproduction.[80] Slightly more than half of the responding firms reported use of at least one of these hazardous substances, but only forty percent of these hazardous workplaces acknowledged that such exposure might cause reproductive harm.[81] Twenty percent of the firms had some restrictions on employment, and all but one of these policies restricting opportunities for fertile workers applied to women only.[82] When restrictive policies were present, the

77. Becker, *supra* note 62, at 1226; Scott, *supra* note 42, at 180; Seminario, *supra* note 54, at 18.

78. *See* Seminario, *supra* note 54, at 22 (noting the limited amount of research in reproductive toxicology, especially with regard to male workers).

79. *See also* Maureen Paul et al., *Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work, and Health Survey*, 16 AM. J. INDUS. MED. 267, 273 (1989).

80. *Id.* at 270-71.

81. *Id.* at 271.

82. *Id.* at 273.

majority of the workforce was almost always male.[83]

For many women, the choice is between a hazardous "man's" job and an equally hazardous "woman's" job at lower pay and with less valuable medical benefits.[84] Women in laundries and dry cleaners are exposed to carbon disulfide and benzene.[85] Female laboratory technicians are exposed to benzene and other dangerous chemicals.[86] Infectious agents and chemicals create risks of fetal harm to health care workers, laboratory workers, and hospital laundry workers.[87] Dental offices are often contaminated by mercury.[88] Pottery painting, a traditionally female job, involves exposure to lead.[89] Elementary school teachers, doctors' office receptionists, child care workers, and mothers are often exposed to illnesses that can be hazardous to fetuses, such as German measles and other viral diseases.[90] Taxi drivers are exposed to noxious fumes and risk accidents, either of which can harm a fetus.[91] However, all possibly fertile women have

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83. *See id.* at 273 (reporting that more than four-fifths of Massachusetts chemical and electronic firms that excluded broad categories of women from jobs had primarily male workforces).

84. *See* Mary E. Becker, *Sterile Women Only Need Apply: Fetal Protection Policies and* Johnson Controls, 1991 WL 330749, at *3 (Jan. 1991) (published exclusively in Westlaw) (arguing that the better choice for potential children is to have their mothers work in higher paying hazardous men's jobs with better medical benefits rather than in hazardous, lower paying women's jobs).

85. David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 115-16 (1992) (citing NANCY M. CHENIER, REPRODUCTIVE HAZARDS AT WORK 44-45 (1982)).

86. *See* Seminario, *supra* note 54, at 19 (noting that laboratory workers are exposed to potentially hazardous chemicals including the suspected carcinogens benzene and benzidine).

87. *See* Linda Coleman & Cindy Dickinson, *The Risks of Healing: The Hazards of the Nursing Profession*, *in* DOUBLE EXPOSURE, *supra* note 42, at 37, 44-50 (noting the numerous fetal and reproductive risk posing substances that nurses are exposed to in hospitals); Seminario, *supra* note 54, at 19-22 (listing the infectious agents and toxic chemicals that laboratory workers, health care workers, and hospital laundry workers are exposed to, and noting that these agents may injure a fetus during development).

88. *See* James C. Hyatt, *Protection for Unborn? Work-Safety Issue Isn't As Simple as It Sounds*, WALL ST. J., Aug. 2, 1977, at A1, A31 (noting that mercury often contaminates dental offices where many young women work).

89. *See* Jeanne M. Stellman & Mary S. Henifin, *No Fertile Women Need Apply: Employment Discrimination and Reproductive Hazards in the Workplace*, *in* BIOLOGICAL WOMAN-THE CONVENIENT MYTH 115, 120 (Ruth Hubbard et al. eds., 1982).

90. *See* Scott, *supra* note 42, at 180, 182 (stating that 83% of elementary teachers are female and that their exposure to German measles and other viruses poses a significant risk to fetuses in utero during the first trimester of pregnancy).

91. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 917 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting) (questioning how fetal risk from maternal lead exposure in a factory compares to the hazard of driving a taxi in order to highlight the fundamental illogicality of Johnson Controls' exclusionary

not been excluded from jobs such as these.[92] Rather, such policies have arisen only for higher paying men's jobs.[93]

This pattern should not be surprising. An employer faced with evidence that a group is hypersusceptible is likely to make the decision to exclude that group based, not on the costs and benefits to the workers and their families, but on the employer's need for members of that group in its labor force. If the group is very marginal—as women are in traditionally male jobs—the employer has every incentive to exclude the group's members even though the heightened risks may be very low (or only vague worries) and the benefits of allowing the group to work (benefits to women and their children) are very high. Women are "marginal" potential workers for traditionally male blue-collar jobs in the sense that women are likely to be less attractive as employees than men are. Employing women in these jobs entails added costs in providing washrooms and, for many jobs involving exposure to hazardous chemicals, showers for washing off chemicals at the end of the work day. Protective equipment, clothing, and tools designed for women rather than men may be necessary. Often, men in traditionally male jobs are hostile to women as co-workers. Admitting women is therefore likely to be disruptive and employers understandably dislike disruptions and disputes among employees. In such an environment new women employees may be less productive than new men employees because, for example, on-the-job training by co-workers may be more difficult for the women to negotiate successfully.

Policies excluding all fertile women have arisen mostly, perhaps entirely, in unionized industries with rigid pay scales.[94] Employers in these industries cannot offset the high costs of employing women by paying women lower wages, because such a differential would be an obvious violation of the Equal Pay Act.[95] In addition, unionized employers are likely to pay higher than average wages and therefore can

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job policy), *rev'd*, 499 U.S. 187 (1991).

92. Seminario, *supra* note 54, at 18 (recognizing that approximately 70% of all working women are employed in clerical, service and professional technical jobs).

93. *See* Becker, *supra* note 62, at 1239 n.100 (noting the development of two corporation's fetal protection policies, which excluded pregnant or fertile women from production jobs after women began bidding for the jobs).

94. For example, companies known to have had policies excluding all fertile women from certain jobs prior to the Supreme Court decision in *Johnson Controls*, include Olin, American Cyanamid, Union Carbide, General Motors, Bunker Hill, Allied Chemical, B.F. Goodrich, Monsanto, St. Joe's Minerals, ASARCO, Sun Oil, Gulf Oil, and Delco-Remy.

95. 29 U.S.C. § 206(d)(1) (1988).

usually hire as many workers as needed without employing women. These employers are therefore the only employers likely to exclude all fertile women because of fetal hazards, and are likely to do so for those jobs, higher-paying men's jobs, which would pay women the most.

Thus, from a policy perspective, a second problem with fetal vulnerability polices that exclude all women or all fertile women from certain jobs is that they "protect" (exclude) women and children only from higher paying men's jobs, leaving women free to run equal risks in lower paying women's jobs (where they are less likely to have good medical insurance). Protecting children by denying women relatively high-paying men's jobs can be an effective way of protecting children only if one forgets that women are economic actors, financially responsible for their children's welfare. Even a safer, lower-paying alternative job may not be in the best interest of a woman's *living* children or of her unborn or unconceived children, whose future well-being is also likely to be linked to maternal income.

Unlike the employer, who will not take into account benefits of employment either to the employee or to the employee's family in deciding whom to "protect" from reproductive hazards, the individual woman can take into account the advantages and disadvantages of a particular job for herself and her dependents, including her living as well as future children, in light of the probability that she will have another child while fetal health is at risk from occupational exposure.[96]

The case for "protection" might seem strongest when a woman is actually pregnant, so that the risk to the fetus is less speculative. However, when an employer fires a pregnant worker to ensure fetal safety, the result may be unemployment and loss of employment-related benefits. Alternative employment is difficult for a pregnant woman to find. When fired, she may lose her only source of both income and health insurance.[97] Good nutrition and medical care during

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96. Such a decision will be made in light of the information on health hazards that employers are required to provide. *See, e.g.*, 29 C.F.R. § 1910.96(i) (1993) (requiring that employers inform employees of the presence of radioactive materials and associated safety problems); *id.* § 1910.1025(*l*) (requiring that each employer involved in activities that might expose employees to airborne lead inform employees of the regulations set forth in 29 C.F.R. § 1910.1025 and appendices concerning lead-related health and safety measures).

97. Terminated female workers may retain health insurance under the Consolidated Omnibus Reconciliation Act of 1985 (COBRA), 29 U.S.C. §§ 1161-68 (1988 & Supp. IV 1992). COBRA allows workers to continue coverage under their former

pregnancy are important from the child's point of view.[98] An employer policy that mandates firing pregnant workers to "ensure" fetal health may do far more harm than good, even from only the fetus' perspective.

A final problem with the pattern of protection is that fertile men have never been excluded from jobs because of reproductive hazards. As indicated above, there is much evidence to indicate that many fetal risks are associated with paternal exposure,[99] yet no employer has switched to an entirely sterile work force, excluding fertile men as well as fertile women from desirable jobs.[100] Consider the response to the pesticide DBCP. In the late 1970s, high levels of infertility and sterility were discovered in male workers exposed to this chemical.[101] However, employers did not switch to all-female work forces or to sterile work forces.[102] Instead, the EPA simply banned the chemical for most uses three years after it was known to cause sterility in male workers.[103] When women are faced with a reproductive hazard, they lose their jobs; when men are faced with a reproductive hazard, the

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employer's health plan if they pay the premiums formerly paid by their employers. *Id.* Many terminated employees, however, fail to take advantage of the health coverage extension period under COBRA because of their inability to afford the premiums. *See* Jeffrey R. Pettit, Comment, *Help! We've Fallen and We Can't Get Up: The Problems Families Face Because of Employment-Based Health Insurance*, 46 VAND. L. REV. 779, 796 (1993).

98. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 918 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting) (noting the strong correlation between the health of the infant and prenatal medical care and nutrition), *rev'd*, 499 U.S. 187 (1991).

99. Refer to notes 48-59 *supra* and accompanying text.

100. *See* Becker, *supra* note 62, at 1226 (listing the names of companies that have adopted fetal protection policies excluding all fertile women from jobs involving exposure to suspected dangerous chemicals).

101. *See* Sonia Jasso & Maria Mazorra, *Following the Harvest: The Health Hazards of Migrant and Seasonal Farmworking Women*, *in* DOUBLE EXPOSURE, *supra* note 42, at 86, 95 (noting the 1976 discovery that DBCP, a pesticide, caused sterility in men involved in manufacturing the chemical).

102. *See id.* at 95-96 (contrasting the response to DBCP's adverse reproductive affects on men with the response to the pesticide TOK, which causes birth defects in the children of exposed women). The authors noted no shift in hiring patterns in response to the risk of sterility for male farm workers associated with DBCP. *Id.* In contrast, the EPA's warning statement about the birth defect risks associated with women's TOK exposure led employers, or allowed them, to refuse to hire women farm workers. *Id.* at 96.

103. *See* REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 35-36 (noting that governmental agencies respond differently when dealing with the reproductive risks faced by men as opposed to the risks faced by women, and providing DBCP as an example of the government banning a chemical outright because it was shown to cause sterility in men); Jasso & Mazorra, *supra* note 101, at 95 (noting that male reproductive capacity was endangered by DBCP, but men of reproductive age were not removed from their jobs).

hazard is removed.[104]

A number of factors explain the greater likelihood of "protecting" children from risks associated with maternal rather than paternal occupational exposure. When we think of women and children, we tend to think only of women's reproductive role at conception, during pregnancy, and during and after childbirth.[105] When we think of men and children, we are likely to think immediately of men's economic responsibilities; the father's physical link to the child at conception is likely to seem of far more marginal importance than the mother's many physical links to her child.[106] With the economic link between fathers and children at the fore, we can easily see that keeping fathers from high-paying jobs may well be counterproductive for their children.[107]

In addition, we see men as autonomous actors with their own interests in jobs and careers independent of their families.[108] We are more likely to see women primarily in terms of their non-economic reproductive roles, and less likely to see them as independent actors with their own interests in jobs and careers independent of their children.[109]

Taken together, these various policy problems suggest that even were fetal risks the same for men and women, as they are likely to be for at least some hazards, we would tend to see the pattern of "protection" that arose prior to the Supreme

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104. For an example of a male reproductive hazard routinely ignored, refer to notes 66-69 *supra* and accompanying text (discussed lead).

105. *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308-09 (1991) (arguing that the male-dominated social conception of procreation with its emphasis on women's role from conception through child-rearing forms the basis for discriminatory legal treatment of women in the workplace).

106. *See* Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 84-93 (1989) (arguing that the male conflict between work and family arises in part from the stereotype that constricts the role of men to primarily that of breadwinners).

107. A significant proportion of jobs barely provide a minimal income sufficient for a primary wage earner to support a family. *Id.* at 109-10 n.100. If men are kept from high-paying jobs, these same men might be unable to secure employment with high enough incomes to provide adequately for the nutritional and health-care needs of their families. *Id.* The trade-off, therefore, between the risk due to a father's job-related exposure and the risk due to potential poverty may be counterproductive from the viewpoint of the child.

108. *See id.* at 91-98 (stating that men are socialized to define themselves by their work and noting that the employee role is kept separate from family responsibilities by an implicit term of the social employment contract).

109. Catharine MacKinnon believes that the gender-neutral approach of discrimination law ignores the fact that women's poverty, financial dependency, motherhood, and "sexual accessibility" comprises women's status as women. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 73 (1987).

Court's decision in *Johnson Controls*.[110] Moreover, this policy analysis indicates that employers cannot "protect" children by excluding fertile women from high-paying jobs or by firing pregnant women. Such policies both discriminate on the basis of sex, turning perceived differences between women and men into advantages for men and disadvantages for women,[111] and fail to ensure the well-being of future generations.[112] It seems likely, however, that the judges on the federal appellate courts who decided the fetal vulnerability cases were affected by some of the same biases and stereotypes as those affecting employers.[113]

C. *The Supreme Court Decision in* Johnson Controls

All nine of the Supreme Court Justices deciding *Johnson Controls* agreed that a policy closing certain hazardous jobs to fertile women discriminated on its face against women and therefore violated Title VII, unless sex was a bona fide occupational qualification (BFOQ) for the job.[114] Although the employer argued that it was not motivated by any intention to

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110. Refer to notes 79-93 *supra* and accompanying text for a description of typical employment policies for fetal protection, primarily exclusion of women from blue collar positions in predominately male workforces.

111. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 116 (1979) [hereinafter SEXUAL HARASSMENT] (stating that sex discrimination "is a system that defines women as inferior from men" and that disadvantages women for their differences from men).

112. Refer to notes 48-59 *supra* and accompanying text for a summary of scientific evidence on reproductive risks associated with fathers who are exposed to toxic workplace substances. Fetal protection policies that exclude pregnant women or fertile women from jobs, but not men, in effect only exclude half of the adult population from jobs in which exposure poses a risk to future generations.

113. Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990); International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), *rev'd*, 499 U.S. 187 (1991); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982). Refer to notes 11-20 *supra* and accompanying text for a discussion of the legal analysis used by the circuit courts. When the disadvantages to children of firing pregnant women was plain in light of the obvious alternative of transferring the pregnant workers to less hazardous jobs, two courts considering such situations ruled in favor of the pregnant workers. *Hayes*, 726 F.2d at 1546-51 (stressing that the defendant hospital should have examined alternative employment for the plaintiff, an X-ray technician, before firing her upon learning of her pregnancy); *Zuniga*, 692 F.2d at 987-94 (finding that the defendant hospital violated Title VII by forcing the plaintiff, a pregnant X-ray technician, to resign instead of allowing her to take a leave of absence).

114. *Johnson Controls*, 499 U.S. at 189 (Blackmun, J.); *id.* at 211 (White, J., Rehnquist, C.J., & Kennedy, J., concurring in part and concurring in the judgment); *see id.* at 223 (Scalia, J., concurring in the judgment) (pinpointing the Pregnancy Discrimination Act of 1978 as the source for finding Johnson Control's policy facially discriminatory, and assuming the BFOQ defense applied).

discriminate against women, but only by its desire to avoid causing harm to future generations, the Court held that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."[115] The Court rejected the convoluted reasoning of the lower federal courts, discussed earlier, which held challenges to similar policies as disparate impact cases subject to a business necessity defense, rather than as disparate treatment cases.[116]

Because the *Johnson Controls* Court recognized a policy limiting fertile women's employment opportunities as treating women and men differently, the crux of the Court's decision is its discussion of the BFOQ cases.[117] The issue was whether the BFOQ cases involving safety cases support use of the BFOQ to exclude all fertile women for the safety of unborn and unconceived offspring.[118] The earlier cases involved slightly different fact situations, however. In both cases discussed in detail by the Court, *Dothard v. Rawlinson*[119] and *Western Air Lines, Inc. v. Criswell,*[120] the employer's safety concern was directly related to job performance as it affected the safety of prison inmates or customers.[121] The majority of the Court distinguished *Johnson Controls* from *Dothard* and *Criswell* on the ground that Johnson Controls' BFOQ defense was unrelated to job qualifications, that is, to women's ability to perform the assigned tasks.[122] In the cases recognizing a BFOQ defense, "the safety of third parties" was indispensably related "to the particular business at issue."[123] The Court regarded "unconceived fetuses of Johnson Controls'

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115. *Id.* at 199.

116. *Id.* at 198 (criticizing the disparate impact analysis used by the Eleventh Circuit in *Hayes*, and by the Fourth Circuit in *Wright*). Refer to note 34-37 *supra* and accompanying text for a discussion of the circuit courts' rationales for employing disparate impact as opposed to disparate treatment analysis.

117. *See Johnson Controls*, 499 U.S. at 199-207 (discussing the BFOQ safety defense, which requires a showing that all or substantially all of the employers in the excluded category cannot perform the essence of their jobs without endangering third parties).

118. *Id.* at 200.

119. 433 U.S. 321 (1977).

120. 472 U.S. 400 (1985).

121. *Johnson Controls*, 499 U.S. at 202-03; *see also Dothard*, 433 U.S. at 334 (accepting Alabama's safety-based BFOQ defense to justify state correctional facility's exclusion of women from security positions in men's maximum security prison); *Criswell*, 472 U.S. at 422-23 (rejecting airline's safety concerns for airline passengers as BFOQ defense justifying discrimination against flight engineers over the age of 60).

122. *Johnson Controls*, 499 U.S. at 203-04.

123. *Id.* at 202-03 (discussing *Dothard* and *Criswell*).

female employees . . . [as] neither customers nor third parties whose safety is essential to the business of battery manufacturing."[124] The Court also noted that earlier Supreme Court decisions had allowed the BFOQ defense only on a showing that "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[125] The Court pointed out that Johnson Controls had not shown any factual basis for believing that this standard was met.[126] The Court therefore declined to extend the narrow safety BFOQ exception to Johnson Controls' policy excluding all fertile women from certain jobs.[127]

The Court also dismissed Johnson Controls' argument that, given potential tort liability for damage to a fetus as a result of maternal exposure, a policy excluding fertile women was reasonable and permissible under Title VII.[128] The majority made a number of points in responding to this argument, noting that added costs associated with employing women are not, in general, a defense to discrimination[129] and that without a finding of negligence on the part of the employer, the imposition of tort liability would be unlikely.[130] In fact, the majority noted that Johnson Controls had not shown that it faced *any* costs as a result of tort liability, and if there were a conflict between Title VII's anti-discrimination mandate and state tort liability, Title VII would preempt state tort law.[131] The majority concluded that absent potentially ruinous tort liability, employers cannot respond to concerns for fetal safety by implementing employment policies that exclude women.[132]

Four Justices filed concurring opinions. Justice White, joined by Chief Justice Rehnquist and Justice Kennedy, agreed

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124. *Id.* at 203.

125. *Id.* at 207 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)); *see also Dothard*, 433 U.S. at 333 (quoting *Weeks* with approval).

126. *Johnson Controls*, 499 U.S. at 207. The Court noted that the company's moral and ethical concerns for the safety of children born to employees did not constitute evidence in support of a BFOQ defense to a charge of overt sex discrimination. *Id.* at 206. The Court also recognized that "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." *Id.*

127. *Id.* at 206-07.

128. *Id.* at 208.

129. *See id.* at 209-10. The Court noted, however, that costs which "would be so prohibitive as to threaten the survival of the employer's business" might constitute a defense to discrimination. *Id.* at 210-11.

130. *Id.* at 208.

131. *See id.* at 210 (stating that Congress' goals in enacting Title VII would be thwarted if state tort law excused or furthered discriminatory hiring).

132. *Id.* at 210-11.

that the Johnson Controls' policy discriminated on its face and therefore must be analyzed under the disparate treatment model with its BFOQ defense.[133] But Justice White would allow the BFOQ defense to include safety concerns related to third parties, particularly if tort liability imposed significant costs on an employer.[134] Justice White agreed, however, with the majority's remand of the case for further proceedings because the record was insufficient for Johnson Controls to establish such a BFOQ defense.[135]

Justice Scalia, writing separately, concurred in the judgment and with Justice White's conclusion that increased costs, including tort costs, could be considered relevant to a BFOQ defense even though not so heavy as to be ruinous.[136] Justice Scalia concurred in the judgment because Johnson Controls did not assert a cost-based defense.[137]

The Supreme Court's decision in *Johnson Controls* is

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133. *Id.* at 211.

134. *Id.* at 212-13.

135. *See id.* at 220-22 (finding sufficient evidence for the petitioners so that summary judgment in Johnson Controls' favor was inappropriate, but allowing the employer to present evidence as to a BFOQ defense based on substantial tort liability).

In closing, Justice White criticized the decision below to discount the evidence of male reproductive risks associated with lead "merely because it was based on animal studies." *Id.* at 215. Justice White noted that the Supreme Court has approved the use of animal studies in assessing risk. *Id.*

136. *Id.* at 223.

137. *Id.* at 223-24. Justice Scalia made two additional points in his separate concurrence. First, he argued that the evidence of male reproductive risk associated with lead was irrelevant because, under the PDA, pregnancy discrimination is sex discrimination regardless of evidence of male reproductive risk. *Id.* at 223. Second, Justice Scalia criticized as irrelevant the majority's "all or substantially all" BFOQ defense analysis. *Id.* at 223. He concluded that this reasoning was irrelevant because the PDA requires that men and women be treated equally even if *all* women place their children at risk by taking hazardous jobs. *Id.*

Third, Justice Scalia would have interpreted the BFOQ defense to permit cost considerations, even when not ruinous to the employer. *Id.* at 224. Justice Scalia's objection to a BFOQ defense in Johnson Controls' situation is not a wholesale rejection of a cost-based BFOQ defense. *See id.* (giving as an example of an acceptable cost-based BFOQ defense to discriminatory hiring, the case of an employer that refuses to hire pregnant women as crew members on a long voyage because of the cost to equip on-board facilities to deal with foreseeable pregnancy emergencies). Rather, Scalia advocated an employer-friendly interpretation of the BFOQ defense, based on additional costs associated with employing women. *See id.* (suggesting that increased costs alone can support a BFOQ defense). Under this approach, women can be excluded from jobs even if substantially all women could perform them safely and efficiently.

Fourth, Justice Scalia stated that, like the majority, he was willing to assume that an "action required by Title VII cannot give rise to liability under state tort law." *Johnson Controls*, 499 U.S. at 223. Scalia stated that Title VII *accommodates* state tort law through the BFOQ exception. *Id.* Thus, Scalia would allow tort liability to provide the basis for a BFOQ defense if the employer had shown "a substantial risk of tort liability," a showing which Johnson Controls had not made. *Id.*

refreshing in its clarity, especially for readers familiar with the lower court decisions in this area. The Court saw the company's policy as overtly discriminating on the basis of sex.[138] Thus the only question was the availability of the BFOQ defense.[139] The majority's stated reason for disallowing this defense, that the safety of unconceived fetuses is not a concern essential to the business of battery manufacturing,[140] draws a rather formalistic and wooden distinction between Johnson Controls' policy and other policies where the Court had found a BFOQ defense when safety concerns for third parties involved an essential aspect of the employer's business.[141] True, the BFOQ cases involving safety were based on concern for customer safety and therefore relevant to job performance, rather than on concern for the safety of third parties such as unborn or unconceived children. But the Court never explains why this distinction should control.[142]

There are, however, good reasons for disallowing the BFOQ safety defense in cases dealing with fetal vulnerability policies. First, if the policy excludes all fertile women from certain jobs, the needs of individual living women and their living children are being subordinated to the "needs" of beings who may never exist. This is a far cry from protecting living, breathing, clients, customers, and prisoners. Second, to conclude that fetal vulnerability policies banning either all pregnant or all fertile women from certain jobs "protect" children, one must ignore women's economic responsibilities to their families. Children's interests are linked to parental economic interests in a way without parallel for the relationship between an especially risky employee and customers, clients, or prisoners.[143]

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138. *Id.* at 197.

139. *Id.* at 200.

140. *Id.* at 203.

141. *See id.* at 200-06 (emphasizing the language of Title VII's BFOQ provision and the PDA, the legislative history of each, Dothard v. Rawlinson, 433 U.S. 321 (1977), and Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) to illustrate the narrow scope of the BFOQ "safety exception" defense).

142. *See Johnson Controls*, 499 U.S. at 205 (merely stating that because unconceived fetuses are neither customers nor third parties whose safety is essential to Johnson Controls' business, the employer could not rely upon a BFOQ defense to justify its fetal protection policy).

143. Neither the Supreme Court nor the defendant employers in *Dothard* or *Criswell* suggested that the decision concerning the employment of a particular person who might pose a safety risk to third parties was a decision appropriate for the individual employee to make. *See* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 413-23 (1985) (examining whether the *employer's* decision to ground all flight safety engineers for safety reasons survived challenge under the ADEA); Dothard v. Rawlinson, 433 U.S. 321, 328-37 (1977) (scrutinizing whether the state *employer's*

Third, employees, if given adequate warnings of reproductive hazards, are likely to consider the disadvantages of employment in light of such risks in deciding whether to take a job, and are more likely to internalize such costs in assessing the advantages and disadvantages of employment than they are to include in their calculation the cost their employment poses in terms of the safety of customers, clients, or prisoners. Employees may, of course, fail to weigh costs associated with reproductive hazards *perfectly*. But employers adopting fetal vulnerability polices are no more likely to make *perfect* decisions in light of reproductive hazards; employers have *no* incentive to consider the advantages of risky parental employment to workers' families. As between employees and employers that exclude parents or potential parents from hazardous jobs, employees are likely to be the better decisionmakers.

Commentators have criticized the *Johnson Controls* decision for placing the burden of ensuring reproductive safety on parents.[144] For example, in an editorial piece in the Los Angeles Daily Journal, feminist Ruth Rosen referred to *Johnson Controls* as a "hollow victory" giving women the right "to endanger one's life and potential offspring."[145] The *Johnson Controls* opinion does state that "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers of those parents."[146] But the Court here does not

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decision to exclude women from contact jobs as correctional officers in a maximum security prison violated Title VII).

144. Ruth Rosen, *Equal Opportunity Jeopardy*, L.A. DAILY J., Apr. 3, 1991, at 6; *see also* Joseph Losco, *Fetal Rights and Feminism*, *in* FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE 231, 250-51 (Leslie F. Goldstein ed., 1992); Gary Minda, *Title VII at the Crossroads of Employment Discrimination Law and Postmodern Feminist Theory:* United Auto Workers v. Johnson Controls, Inc. *and Its Implications for the Women's Rights Movement*, 11 ST. LOUIS U. PUB. L. REV. 89, 91 (1992) (noting that *Johnson Controls* placed responsibilities for fetal safety upon employees rather than upon their employers); Jennifer Morton, *Pregnancy in the Workplace Sex-Specific Fetal Protection Policies*—UAW v. Johnson Controls, Inc.—*A Victory for Women?*, 59 TENN. L. REV. 616, 634 (1992) (hailing *Johnson Controls* as a decision giving women more control over their employment status, but criticizing the opinion for giving women the "right to risk good health" for themselves and future children rather than expanding the alternatives for working women).

145. Rosen, *supra* note 144, at 6.

146. *Johnson Controls*, 499 U.S. at 206. Elsewhere the Court states: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make." *Id.* at 211. This language does not absolve employers of responsibility for workplace hazards; it only means that Congress has given women the ability to decide whether the economic necessity of employment outweighs the reproductive risks. *See id.* at

indicate that parental choice of a hazardous job absolves the employer of the responsibility to provide a reasonably safe work place. Rather, the Court only states that as between employers and parents (in the context of a case dealing with who should decide whether certain jobs are open to parents or potential parents), parents are better decisionmakers. There are strong reasons, explained above, why this should be so.[147] It does not follow that employers therefore have no obligation to limit reproductive injuries in the workplace, particularly when such injuries can be limited at reasonable cost.[148] Nor can it be concluded that women and children would be better off had *Johnson Controls* been decided the other way.[149]

208, 211 (recognizing that OSHA standards for workplace safety must still be satisfied and concluding that women are the proper decision makers concerning fetal health).

147. *Id.* at 208. At one point, the Court indicates that employer negligence may establish liability for reproductive injuries. *Id.* Absent a showing of employer negligence, liability in tort is unlikely. *See id.* (noting that if Title VII will not allow an employer to exclude women from jobs posing reproductive hazards, and if the employer informs female employees of the risks and does not act negligently, liability is improbable). Although commentators may wish to hold employers strictly liable for fetal defects or reproductive difficulties due to workplace exposure, courts are not likely to impose strict liability absent legislation clearly doing so. *See id.* at 223. Justice Scalia quoted Judge Easterbrook's dissent in the Seventh Circuit's decision to the effect that the legislative forum is available for those who wish to change Title VII, either to take the decision about occupational choice from parents and give it to employers or to hold employers strictly liable for fetal harm due to employees' workplace exposure. *Id.* (Scalia, J., concurring). Refer to notes 160-63 *infra* and accompanying text (explaining that there are no known cases in which workplace fetal hazards have lead to employer liability and discussing the reasons why neither strict tort liability nor negligence-based tort liability in such cases is likely). *But see* Christine N. O'Brien et al., *Employer Fetal Protection Policies at Work: Balancing Reproductive Hazards with Title VII Rights*, 74 MARQ. L. REV. 147, 177-78 (1991) (suggesting that the possibility of tort liability may not be remote).

Nothing in *Johnson Controls* suggests that parental "choice" absolves employers of responsibility for reasonably safe workplaces. *See Johnson Controls*, 499 U.S. at 211-12 (White, J., concurring) (suggesting that a fetal protection policy would be justified if the exclusion of pregnant women from a particular position was reasonably necessary to avoid tort liability which might arise as a result of workplace hazards); *see also* Minda, *supra* note 144, at 114-16 (noting that even after *Johnson Controls*, employers may nonetheless be bound by common law tort duties to prevent fetal injury).

148. *See Johnson Controls*, 499 U.S. at 208 (discussing employers' responsibilities for ensuring standards of workplace safety established by the Occupational Safety and Health Act (OSHA)); *see, e.g.*, 29 C.F.R. § 1910.1025(k)(ii) (1993) (requiring the temporary removal of an employee from exposure to lead when a medical determination has been made to establish that the employee's medical condition places her at an increased risk of harm from exposure to lead); Clyde Summers, Comment, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 500 (1992) (summarizing the general duty on employers to provide employees a place of work free from known hazards).

149. For a discussion of the unfortunate economic effects likely to result when a woman is excluded from employment under a fetal protection policy, refer to notes

To be sure, *Johnson Controls* at least suggests that responsibility for reproductive injuries should rest on the parents who are, after all, the decisionmakers,[150] particularly in light of the Court's subsequent discussion of possible federal preemption of state tort liability.[151] There is validity to this objection. As the Court noted, were states to impose tort liability for conduct required by Title VII, federal law would preempt state tort law. This might seem to suggest that the Court viewed state tort liability for reproductive hazards associated with maternal occupational exposure as inappropriate. But, the Court characterized the tort-liability argument as involving "two equally unpersuasive propositions."[152] The first was that Johnson Controls was trying "to solve the problem of reproductive health hazards by resorting to an [illegal sex-based] exclusionary policy." At this point, the Court clearly stated that the anti-discrimination mandate of Title VII does not eliminate employer responsibility for workplace safety: "Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace."[153] The second "unpersuasive proposition" identified by the Court in the employer's tort liability argument was "a fear that fertile women will cost more." But this too was rejected by the Court: "The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender."[154]

Thus, despite the possible preemption of state tort law if it imposed liability on employers for injuries associated with maternal employment, in the end the Court sees the duty to "police" the workplace for safety as remaining on the employer and sees additional tort liability associated with employing women as not entirely consistent with Title VII. As an aside, the Court leaves open the possibility that "ruinous" tort

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96-98 *supra* and accompanying text. For a description of the negative reproductive effects associated with *paternal* exposure, which would occur even if women were excluded from hazardous jobs, refer to notes 48-59 *supra* and accompanying text.

150. *See Johnson Controls*, 499 U.S. at 206, 211 (suggesting that by enacting Title VII's ban on sex discrimination and the PDA, Congress has left the choice concerning fetal and reproductive risks to be encountered in the workplace to women, free from interference by employers and the courts).

151. *Id.* at 209-10.

152. *Id.* at 209.

153. *Id.* at 210.

154. *See id.* (noting that Congress considered and rejected the idea that employers could discriminate on the basis of pregnancy and related conditions, despite the social costs associated with employing fertile women).

liability might be the basis for a BFOQ defense,[155] but as discussed in Part III of this Article, there is no evidence of such liability yet.[156]

The Supreme Court decision in *Johnson Controls* leaves open and unresolved a number of important questions in addition to the permissible and appropriate scope of state tort law and whether a BFOQ defense would be available to an employer facing catastrophic tort liability as the result of employing women. Other questions include: When, if at all, can employers treat employees differentially in terms of reproductive risk?[157] Can employers adopt policies that apply only to pregnant workers when there is good reason to think reproductive risk is especially high during pregnancy?[158] What problems remain for employees and employers in dealing with jobs posing reproductive hazards in light of *Johnson Controls*?[159] These questions are explored in the next two sections.

III. PERMISSIBLE DISTINCTIONS BETWEEN EMPLOYEES

Under *Johnson Controls*, fertile women and men cannot be treated differently on the basis of reproductive risk, except perhaps if ruinous tort liability is associated with employment of fertile women but not fertile men.[160] To date, tort liability for reproductive workplace hazards has not been a significant problem.[161] If it should become so serious as to threaten the

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155. *See Johnson Controls*, 499 U.S. at 210-11 (withholding judgment as to whether a BFOQ defense might be permissible when the costs associated with hiring women were "so prohibitive as to threaten the survival of the employer's business"); Morton, *supra* note 144, at 632 (recognizing that the Court did not answer the question of whether an exclusionary policy might survive judicial scrutiny if the extra costs of employing female employees was "crippling"). Refer to notes 128-37 *supra* and accompanying text for a discussion of the various degrees of tort liability that the *Johnson Controls* plurality opinions considered sufficient to establish a BFOQ defense.

156. Refer to notes 256-74 *infra* and accompanying text (explaining that the perceived conflict between state tort liability and Title VII's prohibition of sex-specific fetal protection policies is largely theoretical because the likelihood of state tort liability is limited).

157. Refer to notes 160-85 *infra* and accompanying text.

158. Refer to notes 161-85 *infra* and accompanying text.

159. Refer to notes 201-74 *infra* and accompanying text.

160. *See* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 210-11 (1991) (leaving unanswered the question of whether the increased costs of employing fertile women could justify an employer's facially discriminatory fetal protection policy).

161. Refer to notes 256-74 *infra* and accompanying text (discussing the narrow possibility of tort liability); *cf.* Morton, *supra* note 144, at 635 n.138 (suggesting that although companies often claim that exclusionary policies are necessary to avoid

economic viability of an employer and pertains only to employment of one sex while fertile, the *Johnson Controls* decision leaves open the possibility that an employer might then be able to discriminate on the basis of sex under Title VII's BFOQ defense.[162] How the Court would actually rule in such a case is not clear.[163] The problems with allowing employers to act as decisionmakers in such situations are discussed in detail in part III.B.

Short of sex-linked ruinous tort liability, *Johnson Controls* holds that an employer cannot treat fertile women and men differently by excluding only one sex from desirable jobs while the employee is fertile.[164] Other distinctions are, however, imaginable. Three in particular seem especially likely to arise. First, may an employer offer different warnings to fertile women and men, warnings designed to give information about their respective reproductive risks?[165] Second, may an employer offer different options to pregnant or fertile women or men trying to become parents, such as temporary transfers designed to minimize reproductive risk?[166] Third, what policies would be permissible for only pregnant workers with respect to hazardous jobs?[167]

Different kinds of warnings for women and men can take many forms. For example, an employer might only warn members of one sex about reproductive hazards in the workplace.[168] Johnson Controls followed this approach prior to its adoption of the policy excluding only fertile women from

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liability for fetal injury, such liability is a negligible source of potential liability given the broad range of potential liabilities confronting most businesses).

162. 42 U.S.C. § 2000e-2(e) (1988).

163. In *Johnson Controls*, the Court did not expressly state that ruinous tort liability would support a sex-specific exclusionary policy, but did hold that the increased costs of employing fertile women cannot support such a policy absent evidence that the costs threaten "the survival of the employer's business." *Johnson Controls*, 499 U.S. at 210-11.

Despite the resignation of Justices White and Marshall from the *Johnson Controls* Court and their replacement by Justices Thomas and Ginsburg, these changes seem unlikely to radically alter the Court's approach to cases in this area. *See* Jesse H. Choper, *Benchmarks*, A.B.A. J., Nov. 1993, at 78, 78-80 (presenting the view that Ginsburg's appointment will not make a substantial difference in any area of constitutional doctrine including the area of reproductive rights). *But cf.* Morton, *supra* note 144, at 633 (arguing that if Justice Thomas sides with the four concurring Justices in *Johnson Controls*, the extra costs associated with the employment of women could justify a policy excluding women from certain jobs).

164. *Johnson Controls*, 499 U.S. at 200.

165. Refer to notes 168-74 *infra* and accompanying text.

166. Refer to notes 175-82 *infra* and accompanying text.

167. Refer to notes 175-85 *infra* and accompanying text.

168. *See, e.g., Johnson Controls*, 499 U.S. at 191 (providing an example of warnings about lead exposure that were directed solely to female employees).

hazardous jobs.[169] The employer told women that lead exposure was a fetal hazard and "that a woman who expected to have a child should not choose a job in which she would have such exposure."[170] A woman wishing nevertheless to take a job involving lead exposure was required "to sign a statement that she had been advised of the risk of having a child while she was exposed to lead."[171] Men were given no warning of their reproductive risks. Some evidence suggests that after the Supreme Court's decision in *Johnson Controls*, the company may have returned to its earlier policy of giving only women information about the risks of maternal employment.[172] This policy, if in place, should be regarded as impermissible sex discrimination because only women are given information about reproductive risks associated with their employment while men are given no such information.[173]

Technically, any difference in the warnings given women and men could be regarded as a violation of Title VII because women and men are treated differently.[174] Moreover, common sense and simple honesty demand that an employer give accurate information about risks to employees even if what is known differs for women and men. Literal compliance with Title VII might be achieved by giving all employees the same comprehensive explanation of risks which will inform both women and men of the risks for each sex. Requiring employers to give all employees information about the risks for both sexes not only ensures formally equal treatment, it is also desirable from a policy perspective because knowledge about risks routinely run by other employees might be relevant to the decisionmaking processes of some employees considering whether to take a hazardous job. Thus, employers like Johnson

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169. *Id.*; *see also* O'Brien et al., *supra* note 147, at 149-53 (detailing the warnings given by Johnson Controls that did not address the issue of paternal reproductive hazards).

170. *Johnson Controls*, 499 U.S. at 191.

171. *Id.*

172. *See* Peter T. Kilborn, *Employers Left With Many Decisions*, N.Y. TIMES, Mar. 20, 1991, at B12 (quoting a Johnson Controls spokesperson who stated that, in light of the Court's decision, the company would consider returning to its previous practice of warning women of job-related fetal risks and allowing each woman to decide what was in her best interests).

173. *Cf. Johnson Controls*, 499 U.S. at 197-200 (holding that Johnson Controls' sex-specific fetal protection policy was impermissible under Title VII because it applied differently to the reproductive capacities of male and female employees).

174. 42 U.S.C. § 2000e-2(a) (1988); *see also* O'Brien et al., *supra* note 147, at 154 (summarizing the plaintiffs' argument in *Johnson Controls* that the fetal protection policy was "underinclusive because it neglected to protect male employees and their offspring").

Controls should be required to give both women and men information about the risks associated with both paternal and maternal exposure.

Employers may desire to give employees who wish to have children in the near future certain options to minimize reproductive risk during a particularly important time, such as a temporary transfer to a low-risk area at full pay and without any loss of seniority.[175] When scientific evidence suggests significant risks associated with both paternal and maternal employment near the time of conception, temporary job options should be offered to fertile men wanting to become parents as well as to women, before and during pregnancy.[176] Such conduct would not constitute a violation of Title VII.

For some hazards, however, what is known of relative risks might support offering such options only to one sex. Would an employer offering such options only to fertile or pregnant women violate Title VII in light of *Johnson Controls*? If supported by appropriate scientific evidence of differential risks, it should be permissible for an employer to make options available only to pregnant women or to women wanting to become pregnant. For example, a court reviewing a hospital's policy that offers pregnant nurses reassignment to avoid exposure to illnesses known to be hazardous during pregnancy should view the policy as nondiscriminatory, permissible either as affirmative action[177] or under the holding in *California Federal Savings & Loan Association v. Guerra*.[178] In *Cal Fed*,

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175. *See, e.g.*, 29 C.F.R. § 1604.10 (1993) (requiring employers to treat employees temporarily unable to perform their job functions because of pregnancy related conditions as they do other temporarily disabled workers, by giving them modified tasks, alternative assignments, or disability leaves with or without pay); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553-54 (11th Cir. 1984) (requiring an employer to utilize the least discriminatory means available to accomplish fetal protection goals, including offering pregnant employees temporary reassignments when feasible); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992-94 (5th Cir. 1982) (rejecting the employer's refusal to apply its standard policy granting temporary disability leave with guaranteed reinstatement to a pregnant X-ray technician and instead requiring her resignation as the best alternative with the least discriminatory impact).

176. *See* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 197 (1991) (suggesting that Title VII requires that both women and men be provided equal choices as to whether they wish to risk their reproductive health).

177. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 626-41 (1987) (stating that the existence of an affirmation action plan is a legitimate, non-discriminatory reason that rebuts a prima facie case of reverse sex discrimination, and concluding that an employee's sex is one factor that may be taken into account); *see also* United Steelworkers v. Weber, 443 U.S. 193, 200-07 (1979) (concluding that Congress did not intend "to limit traditional business freedom" so as to preclude, under Title VII, voluntary employment policies designed to correct racial imbalances).

178. 479 U.S. 272 (1987).

the Supreme Court upheld, against a Title VII challenge, a California law requiring employers to give only workers disabled by pregnancy the option of an unpaid leave of up to four months.[179] Title VII preempts inconsistent state law, so the validity of California's law depended on the Court's determination that the law did not conflict with the mandates of Title VII.[180] The Supreme Court upheld the California rule on the ground "that Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'"[181] The Court stressed that Congress was concerned about discrimination against pregnant workers, not with banning "preferential treatment of pregnancy."[182]

Thus, an employer could give additional *options* to pregnant workers or to those trying to become pregnant without violating Title VII, as long as those options do not discriminate against fertile or pregnant women.[183] Thus, an employer could offer such employees temporary transfers to low risk areas or special safety gear, at least in the absence of evidence that men trying to have children face similar risks and therefore should have similar options. Some of the language in *Cal Fed* appears to support an employer making options available only to women even when men face similar risks,[184] but on a common sense level it seems quite likely that a court would view such a policy as impermissibly discriminating against similarly-situated men.[185]

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179. *Id.* at 280.

180. *Id.* at 292.

181. *Id.* at 285.

182. *See Cal Fed*, 479 U.S. at 285-88 (discussing the PDA's underlying legislative intent and noting that had Congress intended to prohibit preferential treatment, it would have so stated rather than merely mentioning that the PDA does not *require* employers to extend preferential treatment to pregnant employees).

183. *See id.*; *see also* Kelber v. Forest Elec. Corp., 799 F. Supp. 326, 335 (S.D.N.Y. 1992) (stating that *Johnson Controls* will allow employers to offer less onerous jobs to pregnant women who are incapable of performing more difficult jobs, and concluding that nothing in *Johnson Controls* justifies an employer's refusal to accommodate a pregnant employee's physical limitations).

184. *See Cal Fed*, 479 U.S. at 285 (quoting the appellate court's conclusion that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise"). *But see id.* at 297-98 (White, J., dissenting) (arguing that Title VII prohibits all unequal treatment, including the preferential treatment provided to pregnant employees under the California statute).

185. In one sense, the California statute at issue in *Cal Fed* discriminated against similarly situated men, i.e., men who were temporarily disabled but not given disability leave under the statute. *See Cal Fed*, 479 U.S. at 279 (quoting the trial court's opinion in *Cal Fed* and discussing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (ruling that federal law preempted the

The third distinction employers might want to make is distinguishing between pregnant and non-pregnant workers under circumstances such that the employer's distinction appears to be discrimination against pregnant workers. Under *Johnson Controls*, *fertile* women cannot be treated differently from other workers in the absence of potentially ruinous tort liability[186]—and whether the Court would recognize a BFOQ defense even in that extreme situation is far from clear.[187] But what if an employer policy transfers *pregnant* workers against their will to low-risk positions or fires them in the name of fetal safety?

The reasoning of *Johnson Controls* seems to address this situation. The employer policy transferring or discharging a pregnant employee against her will overtly discriminates on the basis of sex under the PDA.[188] Therefore, such a policy can be upheld only if based on a BFOQ defense,[189] but that defense is not available simply because of an employer's moral or ethical concern for the welfare of the next generation or because of fear of tort liability. On the first point, the Court indicated that parents, rather than employers, were the appropriate decisionmakers under the PDA.[190] On the second point, the Court indicated that only the prospect of catastrophic tort liability might suffice as the basis for such a cost-based BFOQ defense.[191] It is of course possible that the

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state's four-month leave statute because it discriminated in reverse against male employees temporarily disabled who would not receive the pregnancy disability leave)). But disabled male employees are not necessarily the most relevant similarly situated men. Rather, men becoming fathers, i.e., those whose wives are pregnant, are arguably a more relevant comparison group. These men are *not* similarly-situated with their pregnant women co-workers in terms of needing disability leave in order to combine work and reproduction.

186. *Johnson Controls*, 499 U.S. at 210-11.

187. *See id.* at 200, 206 (holding that an employer can implement a fetal protection policy only if it shows that gender is a BFOQ, but finding that Johnson Controls did not support its claimed BFOQ defense); *id.* at 210 (stating that the increased costs of employing women due to potential tort liability cannot support a BFOQ defense for an exclusionary job policy unless the potential costs are catastrophic to the employer's business); refer to notes 183-86 *supra* and accompanying text.

188. *See* 42 U.S.C. §§ 2000e(k), 2000e-2(a) (1988) (making it unlawful to discharge an employee on the basis of gender); *Johnson Controls*, 499 U.S. at 210 (holding that Title VII forbids sex-specific fetal protection policies).

189. *Johnson Controls*, 499 U.S. at 200.

190. *See Johnson Controls*, 499 U.S. at 206-07 (rejecting the employer's concerns that were unrelated to women's performance of the essence of the employer's business as the basis for a BFOQ defense). Refer to note 147 *supra* and accompanying text, explaining that while reproductive decisions remain with the mother, an employer retains a duty to provide a safe workplace.

191. *See Johnson Controls*, 499 U.S. at 210 (holding that Johnson Controls did

Court will conclude differently in a case actually involving employer-imposed limits on the employment opportunities of only *pregnant* women, at least when supported by scientific evidence of risk. But such a result would be inconsistent with the logic of *Johnson Controls* and its sound policy analysis.

From a policy perspective, there are two difficulties with allowing employers to limit the employment opportunities of only pregnant workers, either by firing them or involuntarily transferring them out of high-risk jobs. First, if only pregnant women face limited employment opportunities for the sake of their offspring, we cannot be sure that the distinction is not based on sex, i.e., that the employer would be equally willing, on a similar showing of possible harm, to restrict the employment opportunities of male workers.[192] We have a long tradition of regarding women's needs as subordinate to those of their children, while according men's needs full respect and recognition because only men seem to be independent human beings.[193]

The second problem with allowing employers to fire pregnant workers for the welfare of their children is that if pregnant workers are viewed as economic actors, we cannot be sure that limiting their employment opportunities is in the best interest of their children, born and unborn. When an employer fires a pregnant worker in the name of fetal health, her child may well be born without adequate, or any, health insurance and without the economic resources necessary for a good start on life.

Both these problems—the strong possibility that but for the pregnant workers' sex their employment opportunities would not be limited, and the possibility that job limitations may actually harm these workers' born and unborn children—are exacerbated by the fact that pregnant workers are often marginal workers, i.e., workers employers would

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not present evidence of ruinous tort liability associated with employing women to support a cost-based BFOQ defense, and stating that the "incremental cost of hiring women" cannot excuse a discriminatory employment policy).

192. Refer to notes 48-59, 99-104 *supra* and accompanying text; *see also* Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 266 (1992) (commenting that gender-based social judgments about narrative roles continue to play a large part in decision-making).

193. Refer to notes 105-09 *supra* and accompanying text; *see also* MacKinnon, supra note 105, at 1281-84 (analyzing the history of women's rights and historical perceptions of women's roles as less than citizens with full rights in the United States); Siegel, *supra* note 192, at 280-304 (discussing the 19th century anti-abortion movement in terms of traditional value judgments commonly made concerning women's roles).

happily replace. Pregnant workers are likely to be marginal workers because of the added costs so often associated with continued employment, including the costs of temporary replacement personnel at and after childbirth; additional medical costs, particularly in the common situation where an employer's premiums depend on employees' claims; and additional costs for covering the duties of a worker returning to work after childbirth but needing time off to care for a sick infant.

Congress passed the PDA, in part, because many employers regarded pregnant workers as so marginal as to warrant dismissal.[194] Allowing employers to force these vulnerable workers to take unattractive[195] temporary assignments during pregnancy gives employers the power to try, subtly or not so subtly, to force pregnant workers to resign rather than face a temporary reassignment so unattractive that they would prefer unemployment.[196] To keep employers honest in the sense of offering pregnant workers attractive temporary transfers to low-risk areas, employers should be allowed to give options to pregnant workers but not to force them to take temporary positions they do not want. Most pregnant workers are, of course, quite concerned about fetal health and will be eager to take temporary transfers to low risk jobs provided there is no significant loss of seniority, pay, or benefits. When a pregnant employee is forced to accept such a loss, she may well be right in thinking that the temporary transfer is not in her interest, nor in the interests of her living children or unborn child.[197]

As noted earlier, two federal courts of appeal have considered cases in which hospitals fired pregnant X-ray technicians, and both found that the employer had violated Title VII.[198] In both cases, however, the courts stressed the availability of less restrictive alternatives such as temporary

194. *See* Becker, *supra* note 62, at 1254.

195. "Unattractive" is used in the sense that the women themselves did not request or agree to transfers.

196. *See* Kelber v. Forest Elec. Corp., 799 F. Supp. 326, 335 (S.D.N.Y. 1992) (stating that, even after *Johnson Controls*, an employer cannot justify deliberately assigning a pregnant employee to tasks which she should not, or is unable to, perform and concluding that failure to accommodate a pregnant employee's physical limitations may be viewed as intentional discrimination).

197. Refer to notes 96-98 *supra* and accompanying text for a discussion of the undesirable economic effects on women employees and their children that often accompany exclusionary fetal protection policies.

198. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553-54 (11th Cir. 1984); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992-94 (5th Cir. 1982); refer to notes 11-18 *supra* and accompanying text.

transfers to low-risk areas or reassignment of duties within a department to minimize harmful exposure during pregnancy.[199] Neither court considered or discussed a situation in which an employer forced a pregnant worker to accept a transfer or reassignment she considered undesirable.[200] Despite the broad language of *Johnson Controls*, we cannot be sure how the Supreme Court would respond to such policies, particularly if pay was not drastically cut nor benefits curtailed. Requiring employers to offer pregnant workers alternative employment *options*, rather than allowing them to mandate "special" terms of employment would both ensure that employers offer pregnant workers *attractive* options, likely to be in the best interest of the workers and their children, and would also preclude restrictions on the employment opportunities of women that the employer would not impose on men facing similar reproductive risks.

IV. REMAINING PROBLEMS

A. *Problems for Employees*

Employees of both genders need adequate warning of reproductive hazards so that they can make fully informed decisions about hazardous employment. Employees also need safer workplaces and accommodation of their needs during periods of unusual vulnerability to reproductive hazards.

Under the Occupational Safety and Health Act (OSHA), employers are already required to warn employees of health hazards, including reproductive risk.[201] Unfortunately, OSHA is poorly enforced[202] and employers typically ignore the duty to warn because every incentive cuts in favor of their silence.[203] Disclosure might encourage employees to require

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199. *Hayes*, 726 F.2d at 1551, 1553-54 (stressing the hospital's duty to explore the possible reassignment of the pregnant X-ray technician to another capacity in the radiology department before claiming that her discharge was a business necessity); *Zuniga*, 692 F.2d at 992-93 (holding that the employer hospital did not attempt to locate a replacement technician for the pregnant worker's position, and that the availability of this less restrictive alternative to discharge illustrated that the discharge for pregnancy was a pretext for sex discrimination).

200. *See Hayes*, 726 F.2d at 1545-46 (addressing whether under the PDA an employer can discharge a pregnant worker to protect her fetus); *Zuniga*, 692 F.2d at 987 (same).

201. *See, e.g.*, 29 C.F.R. §§ 1910.96(i), 1910.1017(j), 1910.1025(*l*) (1993) (stating the disclosure requirements for ionizing radiation, vinyl chloride, and lead).

202. *See generally* Thomas O. McGarity, *Reforming OSHA: Some Thoughts for the Current Legislative Agenda*, 31 HOUS. L. REV. 99 (1994).

203. Refer to notes 256-57 *infra* and accompanying text for reasons why employ-

more in the way of compensation or to demand a safer workplace. In addition, if the employee or the employee's spouse or child at risk through the employee develops an illness or condition that *might* be linked to the employee's workplace exposure, prior notification of workplace risks will increase the likelihood that the employee will recognize the link to workplace exposure and will file a workers' compensation or tort claim. Given these powerful disincentives to full disclosure of risks to employees, greater OSHA enforcement of the duty to warn is needed. Perhaps individual workers should be given a private right of action to seek damages or to recover a fine in the event their employer does not adequately warn of known health risks including reproductive hazards.

Employees also need *safer* workplaces to the extent feasible.[204] Fetal safety and reproductive health cannot be achieved by excluding all women who cannot show sterility from jobs involving exposure to hazardous substances, as the failure of the Johnson Controls policy proves.[205] Indeed, one risk of fetal vulnerability policies is that decisionmakers will focus only on eliminating risks to future children associated with exposure of fertile women and fail to eliminate far greater risks actually present to living workers and the children of male workers. This point is illustrated by *Johnson Controls*. That policy excluded all women who could not show sterility from lead exposure on the factory floor but gave male workers no information about reproductive risk[206] nor any ability to lower them by temporary transfers during periods when the men and their wives were trying to conceive.[207] And, of course, lead is harmful to all human life, including

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ers prefer to remain silent.

204. *See* REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 31-32 (arguing that a serious commitment by employers and government to the protection of the reproductive health of both female and male workers is absolutely necessary to guard the health of both individual workers and future generations).

205. *See* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 192 (1991).

206. *Id.* at 208.

207. *See id.* at 192 (stating that one male employee had been denied a request for a leave of absence for the purpose of lowering his lead level because he intended to become a father); *see also id.* at 198 (noting that evidence in the court record demonstrated the "debilitating effect of lead exposure on the male reproductive system"); REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 69-70 (citing several studies that reported many abnormalities to the male reproductive system after exposure to lead including subnormal sperm counts, azoospermia, low sperm motility, poor or absent erection, premature ejaculation, lower chromosome stability, and lowered secretory function).

living workers. At the conference for this Symposium, a number of experts in occupational health indicated that many employers responded to the Supreme Court's decision in *Johnson Controls* by making their workplaces safer.[208]

Finally, employees need accommodation to lower reproductive risk at certain periods of heightened vulnerability, such as during pregnancy or while the female worker or male worker's partner is trying to conceive.[209] *Armstrong v. Flowers Hospital, Inc.*[210] is illustrative of this need. In this case, the plaintiff, Pamela Armstrong, was a nurse working for a hospital that provided home services to patients.[211] During her pregnancy, her employer assigned Armstrong to a patient with cryptococcal meningitis, an infectious and serious illness common among AIDS patients.[212] AIDS patients tend to suffer from a number of opportunistic infections likely to be more dangerous to a child in utero than to a healthy adult.[213] Armstrong told her supervisor that because she was in the first trimester of pregnancy she should not treat the patient.[214] Her supervisor informed her that the hospital's policy was not to reassign nurses on the basis of unusual risks,[215] and Armstrong was given two days to decide whether to treat the patient or lose her job.[216]

Armstrong refused to treat the patient and was fired.[217] Eventually, she lost her medical insurance as well.[218]

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208. New Challenges in Occupational Health Symposium, Houston, TX, Mar. 4-5, 1993 (organized by the University of Houston Health Law & Policy Institute).

209. *Cf.* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553-54 (11th Cir. 1984) (holding that the employee successfully rebutted employer's business necessity defense by showing that employer did not consider alternative duties for the employee that would provide the dual purpose of minimizing danger to the fetus and being less discriminatory towards the employee); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992-94 (5th Cir. 1982) (holding that an employer should consider hiring a temporary replacement for a pregnant worker rather than permanently discharging her).

210. 812 F. Supp. 1183 (M.D. Ala. 1993).

211. *Id.* at 1185.

212. *Id.* at 1186.

213. *See id.*

214. *Id.*

215. *Id.* The employing hospital apparently had a policy to reassign pregnant workers within the hospital so that they did not treat patients in "isolation." *Id.* Some dispute existed as to whether the AIDS patient assigned to Armstrong for home care was an "isolation" patient. *Id.*

216. *Id.*

217. *Id.*

218. *See id.* at 1187 (noting that Armstrong maintained medical insurance coverage pursuant to COBRA at a greatly increased cost for as long as she was able). Because her pregnancy was a preexisting condition, she was unable to procure insurance elsewhere. *Id.* Refer to note 97 *supra* for a description of the function and availability of COBRA benefits for terminated employees.

Although her husband had insurance, this coverage did not include family coverage for pregnancy or childbirth.[219] Because of the hospital's failure to accommodate Armstrong's heightened vulnerability during pregnancy,[220] her child was born without medical insurance.[221]

Armstrong sued her employer under Title VII, alleging "that the defendant discriminated against her based upon her pregnancy when it required her to treat an AIDS patient or be subject to termination."[222] She alleged discrimination under both the disparate treatment and disparate impact models.[223] The district court dismissed the disparate treatment claim because, in fact, her employer had not treated pregnant nurses differently from non-pregnant nurses: nurses in both categories were required to treat patients assigned to them.[224] This portion of the court's opinion makes perfect sense.[225]

The district court also dismissed Armstrong's claim that the employer's failure to accommodate pregnant workers by reassigning them violated Title VII because of its disparate impact on pregnant workers.[226] This part of the decision is more problematic. The district court admitted that the employer's failure to treat pregnant workers differently had an adverse impact on pregnant workers, but regarded this causal link as insufficient to create "a prima facie case of disparate impact pregnancy discrimination" because the actual, intervening cause for Armstrong's discharge was her refusal to do her job.[227] The employer noted that courts had not extended the PDA to require that employers take affirmative steps to accommodate pregnant workers, and cited *Johnson*

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219. *Armstrong*, 812 F. Supp. at 1187.

220. Not only would an infection be more serious during pregnancy, but there was also evidence that Armstrong was more likely to sustain an infection during pregnancy because she suffered from gestational diabetes. *Id.* at 1186. During pregnancy, her immune system would be weakened and more vulnerable to opportunistic infections. *Id.*

221. *See id.* at 1187 (summarizing circumstances due to Armstrong's discharge that left her without comprehensive medical insurance coverage for her pregnancy and the birth of her baby).

222. *Id.* at 1188.

223. *Id.* at 1189-90. Refer to notes 21-28 *supra* and accompanying text for a review of these two primary methods of claiming and proving employment discrimination.

224. *Armstrong*, 812 F. Supp. at 1190.

225. In fact, Armstrong's claim was that her employer's failure to treat pregnant nurses differently violated Title VII. *Id.* at 1190 n.10. *But see id.* at 1191 (noting that Title VII's purpose was not to require accommodation of pregnant employees rising to the level of preferential treatment).

226. *Id.* at 1191.

227. *Id.*

Controls for the proposition that "it is the woman's decision to make as to whether or not to subject the fetus to harm."[228] *Johnson Controls* does indeed support the point that the decision should be Armstrong's.[229] However, had Armstrong's employer offered home health care nurses safer options, such as reassignment during pregnancy, as it did for pregnant nurses caring for "isolation" patients in the hospital, the decision about her child's safety would still have been Armstrong's to make.[230] Indeed, she would have been able to make a better decision because more options would have been available to her.

It is true that federal courts have not required employers to accommodate the needs of pregnant workers in enforcing the PDA.[231] A duty to accommodate is, however, regarded as part of the duty not to discriminate in two other contexts: religion under Title VII;[232] and disability under the Americans with Disability Act of 1990 (ADA).[233] A failure to accommodate in a case like *Armstrong* could similarly be seen as discrimination, especially under the disparate impact model.[234] That courts have not as yet recognized this as actionable

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228. *Id.* at 1192. This position allowed the court to find that Title VII is not implicated when a pregnant woman must decide whether to perform her job and risk her baby's safety or to refuse to do her job. *Id.* at 1191. This reasoning led to the conclusion that the plaintiff's decision, rather than that of her employer, was responsible for termination of her job. *Id.*

229. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991) (determining that it is parents and not employers who should make decisions concerning future children's welfare and that Congress intended that the PDA place fetal safety concerns with the family).

230. *Armstrong*, 812 F. Supp. at 1186. Refer to note 215 *supra* for a description of the hospital's policy of reassigning pregnant nurses from treatment of "isolation" hospital patients, which was apparently considered inapplicable to the nurses providing home health care.

231. *See Johnson Controls*, 499 U.S. at 210 (noting that Congress intentionally declined to require preferential treatment of pregnant workers when it passed the PDA); Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1084 n.14 (1983) (rejecting the argument that the PDA requires special treatment of pregnancy in order to fulfill the general policies of Title VII). *But see* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553-54 (11th Cir. 1984) (finding that the defendant hospital had failed to consider the less discriminatory alternative of temporary reassignment for the plaintiff and instead illegally fired her upon learning of her pregnancy); Wright v. Olin Corp., 697 F.2d 1172, 1191 (4th Cir. 1982) (explaining that the business necessity defense may be rebutted by evidence showing that policies other than discharge are available to the employer); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992-94 (5th Cir. 1982) (finding that the hospital's business necessity defense failed because it did not attempt to provide the pregnant plaintiff with a leave of absence, an available and less discriminatory means of protecting her fetus).

232. 42 U.S.C. §§ 2000e(j), 2000e-2(a) (1988).

233. 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1991).

234. *See Hayes*, 726 F.2d at 1553-54 (discussing the possibility of an employer finding the business necessity defense unavailable to him, when faced with a dispa-

discrimination reflects in part the fact that prior to the 1989 Supreme Court case of *Wards Cove Packing Co. v. Atonio*,[235] many courts regarded the disparate impact model as available to challenge only tests and other objective employment criterion such as educational requirements.[236] These courts did not consider that the disparate impact theory could be used to challenge workplace rules like that at issue in *Armstrong*.[237] In *Wards Cove*, the Supreme Court recognized that the disparate impact model is broadly available to challenge employment practices other than tests and objective requirements, such as hiring through certain networks for some jobs and other networks for other jobs, that nonetheless have an adverse impact on the employment opportunities of a protected class.[238] The Civil Rights Act of 1991, which amended Title VII, codified and perhaps expanded this interpretation of Title VII.[239] It clearly indicates that the disparate impact model can be used to challenge "a particular employment practice" or

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rate impact claim for firing a pregnant worker, due to the fact that other alternatives would allow him to accommodate her pregnancy); *Wright*, 697 F.2d at 1191 (same); *Zuniga*, 692 F.2d at 992-94 (same).

235. 490 U.S. 642 (1989).

236. In this racial discrimination case, the *Wards Cove* Court entertained a disparate impact challenge to the employer's *subjective* hiring decisions, although the plaintiffs did not prevail on the merits. *Id.* at 647, 675.

237. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 797 (5th Cir. 1986) (holding that only the disparate treatment model is available to a plaintiff challenging a discretionary promotion system), *vacated*, 487 U.S. 977 (1988); Lewis v. NLRB, 750 F.2d. 1266, 1271 n.3 (5th Cir. 1985) (stating that the use of subjective criteria to evaluate employees in hiring is analyzed, "not under the disparate *impact* model, but instead under the disparate *treatment* model") (quoting Walls v. Mississippi State Dep't of Pub. Welfare, 730 F.2d 306, 321 (5th Cir. 1984)); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188 (5th Cir. 1983) (holding that the disparate impact model did not apply to subjective criteria used to evaluate employees in hiring and job placement decisions); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981) (holding that subjective decision-making practices of an employer "cannot alone form the foundation for a discriminatory impact case"). A split of authority existed on this point until the United States Supreme Court resolved it in *Watson*. 487 U.S. at 989-90 (ruling that an employer's subjective hiring, firing, and promotion policies may form the basis for a disparate impact case). The Ninth, Eleventh, and D.C. Circuits had earlier held that subjective practices alone could support a disparate impact case. *See* Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1480-86 (9th Cir. 1987) (en banc) (allowing the use of discretionary or subjective criteria as a basis for a disparate impact case), *rev'd on other grounds*, 490 U.S. 642 (1989); Griffin v. Carlin, 755 F.2d 1516, 1522-25 (11th Cir. 1985) (holding that a disparate impact challenge to an employer's subjective selection procedures is allowable); Segar v. Smith, 738 F.2d 1249, 1288 (D.C. Cir. 1984) (finding that an employer's subjective judgments as to work assignments, supervisory evaluations, disciplinary procedures, and promotion processes are subject to challenge under a disparate impact theory), *cert. denied*, 471 U.S. 1115 (1985).

238. *Wards Cove*, 490 U.S. at 656-57.

239. 42 U.S.C. § 2000e-2(k)(1) (Supp. III 1991).

even an employer's "decisionmaking process" if that process can not be broken down into particular practices with a demonstrable disparate impact on a protected group.[240]

An employer practice, like that challenged in *Armstrong*, of refusing to accommodate health care workers especially vulnerable to reproductive hazards has a clear disparate impact on pregnant workers.[241] Such a practice should be permitted only if the employer is able to show the requisite business necessity.[242] True, courts have not yet recognized that failure to accommodate pregnant workers' needs is a Title VII violation, but such a finding would be consistent with general disparate impact notions under *Wards Cove* and the Civil Rights Act of 1991.[243] Nor should courts require

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240. *See id.* § 2000e-2(k)(1)(A)(i) (allowing plaintiffs to make a prima facie case of discrimination by showing that an employer's practices cause an adverse disparate impact on a protected category); *id.* § 2000e-2(k)(1)(B)(i) (requiring plaintiffs to identify each specific employment practice causing a disparate impact, except if the various aspects of the employer's decisionmaking process having an adverse result for a protected category is not capable of separation).

241. Such a policy of refusing to reassign or otherwise accommodate employees concerned about reproductive hazards, although neutral on its face, will adversely affect the population of health care workers who are pregnant. Refer to notes 26-28 *supra* and accompanying text (discussing the disparate impact model).

242. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. III 1991) (stating that a plaintiff can establish an unlawful employment practice due to its disparate impact on a category of persons protected under Title VII only if the plaintiff identifies a particular practice having an adverse impact and the employer cannot demonstrate "that the challenged practice is job related" and a "business necessity").

Case law has yet to flesh out the meaning of the term "business necessity" when the challenge is to a decisionmaking process or other employment practice unrelated to tests and objective employment criteria such as educational requirements. Presumably, in a situation like that in *Armstrong*, the employer would have to show that because of its small scope of operations, economic hardship, or other circumstances, it could not, without undue burden to its business, accommodate the needs of nurses like Pamela Armstrong through special assignments. This business necessity and undue hardship defense would be analogous to the limits on the duty of accommodation under the ADA and the religious discrimination provision of Title VII. *See id.* § 12112(b)(5)(A) (requiring employers to make reasonable accommodations for otherwise qualified individuals with disabilities up until the point when accommodation poses an undue hardship on the operation of an employer's business); *id.* § 2000e(j) (1988) (requiring same as to the duty of employers to accommodate employees' religious observation and practice).

243. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658 (1989). The fact that employers must use employment practices having a less discriminatory impact suggests a duty to reasonably accommodate, for example, pregnant women, just as employers accommodate other temporarily disabled workers. *See* S. REP. NO. 331, 95th Cong., 1st Sess. 4 (1977) (stating that the PDA would require employers who provide a general support program for its temporarily disabled workers to provide the same benefits to women temporarily disabled by pregnancy or childbirth), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4752; H.R. REP. NO. 948, 95th Cong., 1st Sess. 5 (1978) (stating that workers temporarily disabled by pregnancy must receive the same benefits as other disabled workers), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4753. *But see* Kelber v. Forest Elec. Corp., 799 F. Supp. 326, 333 (S.D.N.Y. 1992) (dis-

empirical evidence that failure to accommodate reproductive needs has a statistically significant disparate impact. Such a showing should be assumed as long as there is evidence that pregnancy poses an unusual level of reproductive risk. An additional requirement of empirical and statistically significant proof is likely to pose an arbitrary hurdle for employees in small workforces, where statistical significance with respect to a sub-class of only pregnant employees is likely to be difficult or impossible to establish, though common sense indicates such an impact will inevitably be present.

A requirement that employers accommodate pregnant workers' needs in light of reproductive hazards might be required under either the ADA or the Family and Medical Leave Act of 1993 (FMLA).[244] The ADA offers an employee the right remedy—a duty on employers to accommodate.[245] But the employee seeking to use it to minimize fetal hazards while continuing to work will face a serious obstacle in the EEOC guidelines on the ADA, which explicitly exclude pregnancy from the Act's scope.[246] Congress could easily amend the ADA to require that employers offer reasonable accommodation to employees trying to become parents in light of reproductive risks, just as reasonable accommodation is required for other physical conditions and disabilities.[247]

On the other hand, while the FMLA arguably covers pregnancy, it provides the wrong remedy.[248] It only affords an employee who needs time off to care for another in her or his immediate family—which arguably might include safety for

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missing the disparate impact claim of a pregnant worker whose employer did not accommodate pregnancy-related needs because she failed to demonstrate that a specific employment practice had a statistically significant disparate impact on pregnant women).

244. Pub. L. No. 103-3, 107 Stat. 6 (1993) (to be codified at 29 U.S.C. §§ 2601, 2611-19, 2631-36, 2651-54; 5 U.S.C. §§ 2105, 6381-87).

245. 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1991).

246. *See* 29 C.F.R. § 1630 app., § 1630.2(h), at 402 (1993) (distinguishing pregnancy from the conditions protected by the ADA as a result of physical or mental impairment).

247. *See* 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1991) (listing the types of accommodation required of employers with employees who are otherwise qualified individuals with a disability).

248. Leave for protection of a worker's fetus appears to fall within FMLA's statutory definitions of purposes for which leave may be taken. Under the FMLA, leave is available "[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition" or "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." FMLA § 102(a)(1)(C)-(D), 107 Stat. 9 (to be codified at 29 U.S.C. § 2612(a)(1)(C)-(D)). Neither provision actually describes a pregnant woman, but either could be read as extending to cover her.

a child in utero—three months unpaid leave from the job.[249] Assuming the FMLA makes leave available to pregnant workers like Pamela Armstrong, she needs *accommodation* during pregnancy, not time off without pay, so that she can keep working without undue risk to her child.[250] Three months leave is too short a time for a woman to successfully protect her fetus from the many hazards posing risks throughout gestation,[251] and total leave, rather than a job reassignment, is too much time off given her need for income.[252] In addition, if she were to take three months FMLA leave to minimize fetal exposure to a hazard especially dangerous during, for example the first trimester, that leave would limit her ability to take another leave she may want and need when her child is born, because a three-month leave under FMLA is available only once during a twelve-month period.[253]

Employees may also be able to use tort law to establish a duty on the part of employers to accommodate employees' needs for reproductive safety during periods of special vulnerability. For example, in a recent federal case, the plaintiff alleged not only a Title VII violation because her employer failed to accommodate her needs while pregnant, but also that the failure to accommodate was an intentional infliction of emotional distress and a prima facie tort.[254] Although employers' limitations on the employment opportunities of pregnant or fertile women should not be regarded as violating Title VII, it does not follow that employers should not be liable in tort when they fail to offer pregnant workers options which will eliminate or significantly lower fetal risk without unreasonable cost. The welfare of the next generation will be maximized by requiring such accommodation under both Title VII and state tort law.[255] Employers may, of course, face

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249. *Id.* § 102(a)(1) (to be codified at 29 U.S.C. § 2612(a)(1)).

250. The economic harm to the family of a pregnant worker on unpaid leave is nearly as disastrous as outright discharge because often such an employee is responsible for the support of herself and other children. Refer to notes 96-98 *supra* and accompanying text.

251. *See, e.g.*, REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 650-51 (stating that there is a high rate of embryonic loss during the first 60 days of gestation and that toxins can alter or kill the growth of the embryo). The embryonic period is the first three weeks to eight or nine weeks of pregnancy. *Id.* at 49.

252. Refer to notes 96-98 *supra* and accompanying text.

253. FMLA § 102(a)(1), 107 Stat. 9 (to be codified at 29 U.S.C. § 2612(a)(1)).

254. Kelber v. Forest Elec. Corp., 799 F. Supp. 326, 330, 340-41 (S.D.N.Y. 1992).

255. Indeed, there are other situations in which tort liability reinforces the objectives of Title VII and other status protection statutes. *See, e.g.*, Wilson v. Monarch Paper Co., 939 F.2d 1138, 1140-41 (5th Cir. 1991) (holding the employer liable under

conflicts between Title VII and tort liability, the subject of the next section, but accommodating the needs of pregnant workers does not raise such a conflict.

B. Remaining Problems for Employers

In *Johnson Controls* and elsewhere, employers have justified limiting pregnant or fertile workers' employment opportunities on the ground that their employment might lead to tort liability for the employer.[256] Particularly in light of *Johnson Controls*, employers may be caught between a rock, the need to avoid Title VII liability by keeping jobs open to women regardless of reproductive risks, and a hard place, the need to avoid costly tort liability.[257] However, an employer can effectively limit this conflict. First, by offering those workers who pose particularly high reproductive risks, typically pregnant workers or all workers trying to become parents,

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both the ADEA and in tort for intentional infliction of emotional distress for dramatic demotion and humiliation of a 60-year-old vice president reduced to providing cafeteria janitorial services to former subordinates); Bushell v. Dean, 803 S.W.2d 711, 712 (Tex. 1991) (finding the employer liable, under state tort law for intentional infliction of emotional distress, to a secretary forced to quit her job because of sexual harassment by her supervisor).

256. *See, e.g.*, International Union, UAW v. Johnson Controls, 499 U.S. 187, 209 (1991) (noting that although Johnson Controls did not assert potential tort liability costs as a reason for its exclusionary policy toward non-sterile female workers, the prospect of liability was a primary factor behind the policy); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553 n.15 (11th Cir. 1984) (noting the defendant hospital's attempted defense to a claim by a discharged pregnant worker that its policy's goal was to avoid litigation costs and potential lawsuits by a hospital employee or her child); Wright v. Olin Corp., 697 F.2d 1172, 1190 n.26 (4th Cir. 1982) (citing City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978)) (deciding that fetal protection policies adopted only to avoid potential liability and resulting economic loss are insufficient to establish a business necessity defense); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992 (5th Cir. 1982) (stating that the plaintiff's supervisor based his decision to fire the plaintiff solely on his fear of a lawsuit against the hospital by the plaintiff's future child).

257. Concurring Justice White, with whom Chief Justice Rehnquist and Justice Kennedy joined, was acutely aware of this conflict. In *Johnson Controls*, he discussed an employer's need to avoid tort liability as part of any cost containment plan. *Johnson Controls*, 499 U.S. at 212-19 (White, J., concurring in part and concurring in the judgment). Justice White argued, on three grounds, that the BFOQ defense should be construed broadly enough to encompass "considerations of cost and safety of the sort that could form the basis for an employer's adoption of a fetal protection policy." *Id.* at 215. First, it is currently unclear "that compliance with Title VII will pre-empt state tort liability." *Id.* at 213. Second, warning employees of fetal danger will not protect an employer from suit by a worker's child, because a parent generally cannot waive his or her child's causes of action. *Id.* Third, although an injured child's state tort suit will be brought under a negligence theory, employers are unable to determine in advance what standards prove lack of negligence (especially because compliance with OSHA standards is not always a defense to tort liability). *Id.* at 213-14.

special options accommodating their needs with temporary transfer, the employer can limit potential tort liability without violating Title VII.[258] Second, an employer could allow only *sterile* people to hold certain jobs, thus ensuring zero reproductive risk without discriminating on the basis of sex or pregnancy, again without violating Title VII.[259]

In considering the potential conflict an employer faces between Title VII and tort liability, one additional major point must be made: the conflict is entirely theoretical. No known cases exist in which substances or activities regarded as fetal hazards—and the subject of fetal vulnerability policies in any workplace or likely ever to be the subject of such policies—have lead to employer liability as a result of maternal or paternal exposure.

To be sure, some cases have involved allegations of fetal injuries due to maternal employment, but in these cases the injuries were, according to the allegations of the complaints, the result of accidents or an employer's failure to accommodate the needs of a pregnant woman by varying routine workplace practices.[260] Only one case, *Security National Bank v.*

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258. Refer to notes 175-76 *supra* and accompanying text. *Johnson Controls* prevents an employer from mandating discharge or reassignment of employees due to pregnancy or related conditions. 499 U.S. at 210 (citing the PDA and Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1084 n.14 (1983)). However, nothing in the PDA or case law prevents an employer from *offering* alternative assignments to workers who may be seeking a means to lower reproductive risk in anticipation of having a child. Refer to note 177 *supra* and accompanying text.

259. Neither Title VII generally nor the PDA specifically prohibits employment practices that discriminate on the basis of fertility. *See* 42 U.S.C. § 2000e-2(a) (1988) (holding employment practices that discriminate on the basis of sex to be unlawful); *id.* § 2000e(k) (explaining that prohibited sex discrimination includes discrimination on the basis of pregnancy, child birth, and related medical conditions).

260. *See* Kelber v. Forest Elec. Corp., 799 F. Supp. 326, 330 (S.D.N.Y. 1992) (concerning tort claims as well as claims under Title VII for the death of the fetus of plaintiff, an electrician, whose employer transferred her from a heated indoor job to an outdoor job early in pregnancy); Thompson v. Pizza Hut of Am., Inc., 767 F. Supp. 916, 917-18 (N.D. Ill. 1991) (holding that state workers' compensation scheme did not preclude a tort action to recover for injuries suffered in utero by son of Pizza Hut employee for injuries allegedly incurred when the mother was exposed to carbon monoxide fumes at work); Bell v. Macy's Cal., 261 Cal. Rptr. 447, 453 (Ct. App. 1989) (holding that the California workers' compensation scheme provided the exclusive remedy for injuries allegedly caused by medical malpractice in treatment of the mother during her seventh month of pregnancy at the employer's on-site clinic); Keefe v. Pizza Hut of Am., Inc., No. 91 A2005, 1993 WL 17698, at *2-3 (Colo. Ct. App. Jan. 28, 1993) (not released for publication) (holding that a tort claim could be brought for alleged prenatal injury to a child as a result of maternal employment when the pregnant worker informed her employer of doctor-imposed limitations on her work, but the employer refused to honor them); Globe Sec. v. Pringle, 559 So. 2d 720, 721 (Fla. Dist. Ct. App. 1990) (holding employer liable under workers' compensation system for medical expenses associated with pregnancy-related complications caused by an industrial accident); Cushing v. Time Saver Stores, Inc., 552 So.

Chloride, Inc.,[261] involved an injury connected to the kind of recognized fetal hazard that has ever lead to, or would be likely to lead to, a fetal vulnerability policy excluding all fertile or pregnant women from jobs. In that case, the district court affirmed the jury's decision in favor of the employer, a decision apparently based on a lack of causation, although there was evidence that the employer had violated OSHA's general lead standard.[262]

Unless the fetal hazard causes *unique* injuries clearly identifiable as associated with a particular hazard, which does not seem to be the case for occupational risks, causation will tend to be exceedingly difficult to prove.[263] Thus, even if a child can prove negligence on the part of the mother's employer, the necessity of showing that the maternal occupational exposure actually caused the condition will often preclude tort liability. Although physical causation for prenatal injury due to parental exposure can be shown for many non-occupational toxic torts,[264] the lack of firm evidence linking maternal

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2d 730, 731 (La. Ct. App. 1989) (holding that workers' compensation was not the sole remedy for a child born prematurely with severe birth defects as a result of the mother's workplace accident during pregnancy), *writ denied*, 556 So. 2d 1281 (La. 1990); Adams v. Denny's Inc., 464 So. 2d 876, 878 (La. Ct. App.) (holding that a tort claim for the wrongful death of an unborn child as a result of a fall by the mother at work was not barred by the state workers' compensation scheme), *writ denied*, 467 So. 2d 530 (La. 1985); Jarvis v. Providence Hosp., 444 N.W.2d 236, 238 (Mich. Ct. App. 1989) (allowing a tort action for a fetus' death allegedly due to the mother's contraction of hepatitis during her pregnancy because she cut her finger while working in the employer's laboratory); State Indus. Ins. Sys. v. Porter, 734 P.2d 729, 729 (Nev. 1987) (affirming the obligation of the Nevada workers' compensation system to pay medical expenses attributable to an accident that caused the premature delivery of the plaintiff's son after the mother was kicked by a horse on the job); Pichon v. Opryland USA, Inc., 841 S.W.2d 326, 327 (Tenn. Ct. App. 1992) (holding that summary judgment for the employer was inappropriate in a case in which a mother's employer required her to lift heavy objects during pregnancy, causing premature childbirth).

261. 602 F. Supp. 294, 295 (D. Kan. 1985) (involving a suit for damages for birth defects suffered by the daughter of a woman exposed to lead in her employment at defendant's battery manufacturing plant).

262. *Id.* at 296-97.

263. *See* REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 322-24 (discussing the difficulties of proving causation in fetal tort injuries); GUIDELINES ON PREGNANCY, *supra* note 49, at 3 (stating that although some factors relate to occupational exposure and birth defects, most fetal damage is not ascribable to any known cause).

264. Scientists have clearly linked several specific types of toxins to maternal prenatal exposure. Diethylstilbestrol (DES) is one. The drug was given to pregnant women in the United States to reduce the risk of miscarriage. Later it was shown to have been the cause of a rare form of vaginal and cervical cancer in these women's daughters. REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 32. Thalidomide, a European prescription drug used to treat headaches, was another toxin shown to cause major congenital malformations when pregnant women ingested the drug during their pregnancies. *Id.* at 31. Other agents such as alcohol, tobacco, and

occupational exposure to specific fetal injuries makes physical causation difficult to prove.[265] Further, many allegations of harm in real-world disputes caused by parental employment involve paternal, not maternal, occupational exposure.[266] As this suggests, if employing future parents ever does lead to excessive tort liability, the problem cannot be solved simply by excluding women, or pregnant women, from jobs involving recognizable fetal hazards. Such harms can be the result of paternal as well as maternal exposure,[267] and can also result from workplace conditions that are not unusually hazardous.[268]

With respect to workers' *own* injuries, the problem of crippling tort injuries has been handled by workers' compensation schemes.[269] These statutory schemes provide compensation to workers injured on the job without regard to fault,[270] but are the sole basis of recovery to the exclusion of tort claims for employment-related injuries.[271] If crippling tort liability does ever become a serious problem as a result of parental employment, extending workers' compensation schemes to specifically cover all reproductive injuries would be one way to protect employers.[272]

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illegal drugs have been linked to fetal deformities. *Id.* at 32.

265. GUIDELINES ON PREGNANCY, *supra* note 49 at 3.

266. Refer to note 50-52 *infra.*

267. Refer to notes 48-59 *supra* and accompanying text for a summary of the scientific evidence on the adverse reproductive effects of paternal workplace exposure to hazardous substances.

268. *See, e.g.*, REPRODUCTIVE HEALTH HAZARDS, *supra* note 46, at 105 (indicating that occupational stress affects the reproductive system and may lead to infertility in men and women).

269. *See* 82 AM. JUR. 2D *Workers' Compensation* § 1 (1992) (stating that state workers' compensation schemes were designed to compensate workers for injuries arising out of employment); ORIN KRAMER & RICHARD BRIFFAULT, WORKERS COMPENSATION: STRENGTHENING THE SOCIAL COMPACT 1 (1991) (explaining that state workers' compensation schemes compensate employees for the economic consequences of work-related injury, illness, and disease without regard to whether the employer or employee is at fault). Every state has had a workers' compensation scheme. *Id.* at 16.

270. KRAMER & BRIFFAULT, *supra* note 169, at 1; *see* HERMAN M. SOMERS & ANNE R. SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 26 (1954) (stating that workers' compensation schemes were designed to supplant the common law and were based entirely upon a notion of liability without fault, or strict liability).

271. *See* 82 AM. JUR. 2D *Workers' Compensation* § 62 (1992) (stating that generally remedies under workers' compensation schemes are exclusive of all other common law remedies).

272. The general direction of workers' compensation has been to expand coverage and benefits and to broaden definitions of compensable injury. Although a very broad insurance program is possible, it will have high costs and demand higher premium contributions from employers; on the other hand, higher premiums may be cheaper

Perhaps someday there will be a basis for employers' fear that crippling tort liability is more likely to arise as a result of maternal employment than as a result of paternal employment. This possibility could be true if fully-informed women are, in fact, taking unreasonable risks because of an overwhelming economic need that may push them into higher-paying yet more hazardous jobs. Under such circumstances, simply responding by using workers' compensation schemes to bar tort recoveries might be inadequate.[273] Even under these circumstances, however, employers should not be able to decide where and how to protect the next generation.[274]

Congress would be a better decisionmaker than employers[275] for a number of reasons. First, Congress would have no direct financial stake in the issue, thus its decision on whether to allow exclusionary fetal vulnerability policies would be less likely to turn entirely on whether women were marginal workers in the job in question. Second, although members of Congress might share many of the problems employers and courts have in regarding women's interests as distinct from those of their children, they would be subject to political pressure from women who can vote.[276] Therefore,

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than the cost of settling tort claims or paying tort judgments due to work-related reproductive injury. *See generally* KRAMER & BRIFFAULT, *supra* note 269, at 16-18.

Case law is mixed on whether tort causes of action are available for injuries sustained by workers' children or whether the sole remedy for children, as with workers, is within the worker's compensation system. *Compare* Cushing v. Time Saver Stores, Inc., 552 So. 2d 730, 731 (La. Ct. App. 1989) (holding that state workers' compensation scheme did not provide the sole remedy and that the child born with birth defects due to a working mother's accident could bring a tort action) *with* Bell v. Macy's Cal., 261 Cal. Rptr. 447, 453 (Ct. App. 1989) (holding that the state workers' compensation scheme is the child's exclusive remedy).

273. Refer to notes 277-89 *infra* and accompanying text for an outline of more appropriate responses.

274. Refer to notes 144-51 *supra* and accompanying text.

275. Whether any regulatory agency currently has the authority to promulgate sex-specific regulations is not clear. The Nuclear Regulatory Commission has published a regulation that discriminates on the basis of sex. *See* 10 C.F.R. § 20.1208 (1993) (regulating the occupational exposure of a pregnant woman to 0.5 rem of neutron radiation during her entire pregnancy). The Environmental Protection Agency has issued a statement concerning the use of the pesticide TOK which warns that it should not be used by women of childbearing age. *See* Jasso & Mazorra, *supra* note 101, at 96 (citing EPA Reg. No. 707-92-AA, EPA Est. No. 477-MD-1, TOK WP-50, Rohm & Haps).

If Title VII does ban all sex-specific fetal vulnerability policies, federal agencies are acting illegally in promulgating sex-specific regulations affecting employment opportunities. Congress has not, to date, authorized any agency to require or allow employers to violate Title VII.

276. A recent example of the strong influence of women's groups in politics is their role in the appointment of Janet Reno as Attorney General. Women's groups were a relentless force bearing on President Clinton, insisting that a women be

women's interests would not be ignored entirely. Third, congressionally-mandated fetal vulnerability policies would not necessarily shift the costs of fetal safety only to women and their dependents. In the political arena, women could demand, and might receive, some form of compensation for the costs imposed on them when their employment opportunities are limited for the safety of others.

If exclusion of all fertile women from some jobs proves to be appropriate,[277] direct or indirect compensation[278] should be given for the loss caused by that exclusion.[279] For example, fertile women could be given a preference, similar to a veterans' preference, for a comparable number of desirable jobs elsewhere in the economy, such as jobs in government. Women and their dependents are disproportionately poor, thus the cost of protecting the health of unborn children should not be placed entirely on a group in no position to bear it.[280] Without an offsetting preference for fertile women in other jobs, we cannot be sure we are making children better off by limiting their mothers' employment opportunities.[281]

Similarly, if exclusion of pregnant women proves appropriate, some form of compensation, including medical insurance coverage, would be necessary to compensate pregnant workers for the work limits imposed on them at a

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placed in the post. Dan Balz, *Picking the Clinton Cabinet*, WASH. POST MAG., May 9, 1993, at 26.

277. An alternative option, routine pregnancy testing, could be used to allow fertile women to work at jobs involving exposure to chemicals rapidly eliminated from the body. Not all chemicals are retained in the body for significant periods of time. To eliminate carbon monoxide, for example, takes only four hours of normal breathing. ROBERT E. GOSSELIN ET AL., CLINICAL TOXICOLOGY OF COMMERCIAL PRODUCTS 88 (1976). Vinyl Chloride is eliminated within 72 hours of exposure. Environmental Protection Agency, *Ambient Water Quality Criteria for Vinyl Chloride*, EPA No. 44015-80-078, at C-14, C-15 (Oct. 1980). Benzene has a particularly short half-life, somewhere between 0.4 to 1.6 hours. *Id.* at C-9, C-14. Carbon tetrachloride only remains in the blood for 48 hours. *Id.* at C-23. Early detection of pregnancy is now possible so that employers, through regular pregnancy testing, could minimize the risk of fetal injury. Patrick T. Clendenen, International Union, UAW v. Johnson Controls, Inc.: *Fetal Protection and Title VII Revisited*, 7 J. CONTEMP. HEALTH L. & POL'Y 367, 395 n.135 (1991). However, pregnancy testing may implicate privacy questions. Becker, *supra* note 62, at 1234.

278. The term "compensation" is used in a very broad sense to include any benefit given to women excluded from jobs for the safety of their fetuses designed roughly to offset the cost that exclusion imposes on them.

279. If Congress excludes women from jobs without compensating them, the legislation might be unconstitutional under the Takings Clause of the Constitution. U.S. CONST. amend. V.

280. Refer to notes 96-98 *supra* and accompanying text.

281. Refer to notes 94-98 *supra* and accompanying text for a discussion of the detrimental impact on working women and the children they support when an employer's fetal protection policy eliminates or diminishes their jobs.

time when they face high medical bills and increased living expenses.[282] And something more than exclusion of pregnant women is necessary to ensure fetal safety. Fetal safety will be at risk because of pregnant women's exclusion from jobs, and the consequent loss of income and benefits, unless excluded workers receive income and medical insurance from an alternative source.[283]

Although Congress is unlikely to have the time or interest necessary to regulate fetal hazards substance by substance, it could delegate to an agency the power to promulgate regulations excluding fertile or pregnant women from certain jobs if their employers met specified standards for the manner of exclusion and the type and extent of compensation. Congress could give the agency the authority to promulgate cross-industry standards, protecting fetal safety whenever a certain level of risk exists. If the costs of ensuring fetal safety in some industries are much higher than in other industries with regard to the same substance, the agency could instead promulgate industry-specific standards. The agency could also be responsible for compensating women for the costs associated with exclusion in one of several alternative ways. For example, the agency might require employers who exclude fertile women from certain jobs to give women a preference, analogous to veterans' preferences, for an equal number of other jobs with equivalent pay and career potential, preferably in the same locale. Or the agency itself could give women such options for employment in either the private or the public sector.

Furthermore, if restrictions on the employment of pregnant women are appropriate, Congress could direct the agency to protect these especially vulnerable workers and their potential children by ensuring that the women are not simply fired, with consequent loss of both earnings and medical

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282. Refer to notes 84-98 *supra* and accompanying text (summarizing the increased needs of a woman during pregnancy). I do not suggest that a pregnant worker and her child have no interests in common. The pregnant worker is likely to be quite interested in fetal safety. However, she may have other interests, such as supporting herself and her other children, paying her medical bills, and continuing her career. Despite these interests, she might gladly limit her own opportunities for the sake of her unborn child. But one cannot assume that externally imposed limits, designed to protect the unborn child, are in her interest. Refer to notes 94-98 *supra* and accompanying text for a discussion of the policy problems in allowing employers to implement fetal protection policies to the detriment of pregnant workers' other interests.

283. *See, e.g.*, Armstrong v. Flowers Hosp., Inc., 812 F. Supp. 1183, 1187 (M.D. Ala. 1993) (noting that the plaintiff's child was born without the protection of medical insurance coverage because, after the plaintiff was fired because of her pregnancy, she was unable to afford COBRA coverage and unable to obtain another policy).

coverage.[284] The agency could require that state workers' compensation systems treat pregnancy as a disability and provide both disability pay and medical coverage. The agency could also require that employers give leaves to pregnant workers for their periods of disability. Alternatively, the agency could require employers to transfer pregnant women facing specified fetal hazards to other jobs during pregnancy, with no loss of pay or seniority and with the right to return to their former jobs after childbirth.

Congress could also protect fetal safety by directly authorizing employers by statute to exclude workers on the basis of fetal hazards, provided that they meet specified job exclusion and compensation standards. For example, an individual employer could exclude fertile or pregnant women if it could show the level of differential vulnerability by sex required by the statute and if it also compensated the excluded women according to the statutory standard, perhaps in some of the ways suggested above. Like Title VII, such a scheme could be enforced by the EEOC and private litigants.[285]

By enacting or authorizing fetal vulnerability policies such as those described above, Congress could protect fetal health without turning the difference between the risks associated with maternal and paternal employment into an advantage for men and a disadvantage for women.[286] To the extent that compensation is effective, the costs of fetal safety would not be borne entirely by women and their dependents, as is the case

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284. *Johnson Controls* indicates that Title VII and specifically the PDA accomplish this minimal goal. *See* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (holding that an employer's fetal protection policy excluding fertile women from lead exposure jobs violated the PDA); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1554 (11th Cir. 1984) (finding that discharge of plaintiff, a pregnant X-ray technician, was not a business necessity absent exploration of less discriminatory alternatives and was a violation of Title VII). I propose that Congress could amend the ADA or the FMLA to provide greater options and more protection for accommodating the needs of pregnant workers. Refer to notes 244-53 *supra* and accompanying text.

285. *See* 42 U.S.C. § 2000e-5 (1988 & Supp. IV 1992) (delegating to the EEOC the power to enforce Title VII when a complaint is filed with the Commission by acting in its own action against the employer or by allowing the aggrieved private citizen to file civil suit against her employer).

286. As Catharine MacKinnon has noted, discrimination rationally designed to promote fetal safety is often unjust, because it turns a difference between men and women into an advantage for men and a disadvantage for women and thereby supports "a system of second-class status for half of humanity." SEXUAL HARASSMENT, *supra* note 111, at 105; refer to notes 79-84 *supra* and accompanying text for a discussion of the circumstances under which fetal protection policies arise, typically in blue collar, traditionally male workforce situations and not in workplaces with primarily female, non-union, low paid employees.

today with sex-specific policies instituted by employers.[287]

Unfortunately, federal regulation would be costly and perhaps ineffective. At both the agency and congressional levels, various interest groups might try to use the regulatory system to achieve purposes other than those described here. It might be difficult for Congress to ensure effective regulation in terms of either preventing the unreasonable exclusion of women or adequately compensating them.[288]

Given the problems and costs associated with regulation—including the possibility of congressional insensitivity to women's independent interests—regulation should be considered only if there is firm evidence that significant numbers of children are likely to be born with birth defects as a result of maternal occupational exposure. In the immediate future, employers should handle the problem of fetal vulnerability due to parental occupational exposure by following two simple rules. First, employers should fully disclose reproductive risks to working women and men. Second, employers should not discriminate in employment on the basis of pregnancy or potential pregnancy. If an employer desired to allow employees the option of avoiding reproductive hazards during vulnerable times, then it could offer prospective parents temporary transfers or work reassignments.[289]

V. CONCLUSION

This Article has argued that both sound policy and anti-discrimination doctrine dictate the result in *Johnson Controls*: employers cannot exclude fertile women from jobs potentially hazardous to the well-being of their unconceived and unborn children. Similarly, both sound policy and doctrine should

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287. Refer to notes 94-98 *supra* and accompanying text (describing the adverse effects of sex-specific exclusionary fetal protection policies on female workers and their families).

288. These difficulties might be lessened if the regulations helped *employers*, even if by way of unintended effects. OSHA, for example, enjoys support because its regulations have achieved unintended effects benefiting some employers. *See* Ann P. Bartel & Lacy G. Thomas, *Direct and Indirect Effects of Regulation: A New Look at OSHA's Impact*, 28 J.L. & ECON. 1, 25 (1985) (suggesting that interest groups support OSHA because it effectively, though indirectly, transfers wealth to large unionized firms).

289. Refer to notes 175-85 *supra* and accompanying text. This section of the Article discusses the ability of employers to offer work options, with two caveats. They may not discriminate against pregnancy and related conditions, nor may they offer work options only to women if scientific evidence suggests that men too are faced with a reproductive hazard and require equal access to job alternatives. Refer to notes 48-59 *supra* and accompanying text.

forbid employer policies limiting the work opportunities of pregnant women. These results should not, however, absolve employers of the responsibility for providing a reasonably safe workplace. And employers should be free, under Title VII and current caselaw, to offer pregnant women or workers who are prospective parents and thus especially at risk, job options not generally available to workers, such as temporary transfers to low-risk areas.

Johnson Controls does not answer all the needs of employers and employees in this controversial area. For employees, there is still the need for some sort of rule, either a new interpretation of Title VII or an amendment to the ADA, requiring employers to accommodate the needs of future parents during pregnancy or while they are trying to conceive, at least when reasonable accommodation is economically feasible. In addition, employees need far better information about reproductive risks in their workplaces. For employers, there may some day—if significant tort liability does ever become a serious problem—be a need to avoid catastrophic liability, whether resulting from maternal or paternal occupational exposure, perhaps by expanding the workers' compensation system to include fetal injury due to parental workplace exposure.

If scientific evidence reveals that some risks are higher for fertile or pregnant women holding hazardous jobs than for men, and that too many women are taking too many risks, then further changes will be needed. But employers will still not be the appropriate decisionmakers for designing fair fetal protection policies. Congress—or more likely some federal agency empowered by Congress—would be a better decisionmaker because federal rules would cross industry lines. Women and children could then be protected with respect to low-paying women's jobs as well as high-paying men's jobs. In addition, the regulator could be empowered to offer the women whose opportunities are so limited preferences in some other employment, since we cannot otherwise be sure that we are, in fact, acting in the interest of the next generation.